00094619

BOMBAY BRANCH

OF THE

ROYAL ASIATIC SOCIETY.

TOWN HALL, BOMBAY.

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018

# FORENSIC FACTS AND FALLACIES

# FORENSIC FACTS AND FALLACIES

*A Popular Consideration of some Legal Points and Principles*

94619

BY

SYDNEY E. WILLIAMS

*Barrister-at-Law*

. . . ut monitus caveas, ne forte negoti
Incutiat tibi quid sanctarum inscitia legum.—*Hor.*

London:
MACMILLAN & CO.
1885.

[*All rights reserved.*]

CHARLES DICKENS AND EVANS,
CRYSTAL PALACE PRESS.

# CONTENTS.

## CHAPTER I.

PAGE

INTRODUCTORY . . . . . 1

## CHAPTER II.

FREEDOM OF CONTRACT . . . . . 16

## CHAPTER III.

THE LAND LAWS AND THE LAND QUESTION . . 42

## CHAPTER IV.

LIBEL AND SLANDER . . . . . 69

## CHAPTER V.

PAGE
CUSTOMS, CLUBS, AND THE STOCK EXCHANGE . . 91

## CHAPTER VI.

BY-LAWS AND RAILWAY PASSENGERS . . . . 118

## CHAPTER VII.

THE COURT OF CHANCERY AND THE LAW'S DELAY . 142

## CHAPTER VIII.

THE WHOLE DUTY OF A TRUSTEE . . . . 162

## CHAPTER IX.

WILLS AND THEIR PITFALLS . . . . . 185

## CHAPTER X.

MARRIED WOMEN . . . . . 213

## CHAPTER XI.

PAGE

EVIDENCE . . . . . 234

## CHAPTER XII.

THE LEGAL PROFESSION . . . . . 257

# FORENSIC FACTS AND FALLACIES.

## CHAPTER I.

### INTRODUCTORY.

"*Ignorantia juris neminem excusat.*"

THERE is one thing of which we are all supposed to have a full and equal knowledge. And though the observation may seem wanting in reflection, it is nevertheless true, or rather far less than the truth. For the knowledge which every one is assumed to have is the knowledge, not of a simple fact but of a complex science which no one has ever yet mastered, and which the study of a lifetime leaves half unknown. It has often been said, and it is indisputably true, that

the most learned judge on the bench has but an imperfect knowledge of the laws which he administers. And yet it is these laws, with all their refinements and subtleties, that every rustic is bound to know, and ignorance of which the most illiterate may not plead as an excuse.

This irrebuttable presumption, which a moment's reflection will show to be absolutely necessary, is of course a fiction. In theory every one knows the law; in fact no one knows very much about it; and upon a subject so vast and vague there must necessarily be much ignorance and misapprehension. It is, however, so constantly brought to our notice, that we cannot help forming opinions of some kind concerning it; and such ideas carelessly picked up are often carefully retained, though in many cases wrong, and in most inadequate. This ignorance, though not perhaps greater than that with regard to other sciences, is perhaps exceptional in this respect, that it is not so much a want of knowledge as a mis-

taken knowledge, not so much not knowing what is, as a knowledge of what is not; and this is always the most difficult ignorance to deal with. Mere ignorance may be easily enlightened by supplying the needful information; but mistaken notions can only be dislodged by cogent reasoning, if indeed they can be expelled by anything short of dearly bought experience. Cogent arguments have, however, little effect upon the public mind, and are perhaps somewhat out of place in a popular treatise. To tilt at popular fallacies with the heavy lance of close reasoning is a fruitless endeavour. They must be treated lightly, and, so to speak, colloquially; and above all should be approached from the standpoint of the unlearned many, and not from that of the learned few. Here, as elsewhere, the study of ignorance is the first step to imparting knowledge. Analogy and repetition are also useful means of popular instruction, the latter being in many cases the only

effective method of attacking popular error. No unaccepted truth, indeed, can be too often repeated. For, as Mr. Herbert Spencer tells us, "it is only by varied iteration that alien conceptions can be forced upon reluctant minds."

Some legal fallacies are harmless enough; others merely cause inconvenience to the individuals who cherish them; while a few, and these are the most important, affect public opinion on questions of political importance, and give rise to agitations of a more or less mischievous tendency.

A man is of course at liberty to knock his head against a stone wall if he pleases, and if he suffers for his folly, we may deplore his ignorance, but we cannot much regret his discouragement. To avert such wisely ordered consequences, few of us would feel called upon to interfere. But it is otherwise when such an individual induces others to share his error, and to break their heads in a similar manner,

and when, finding the wall too strong for them, they agitate for its removal, to the detriment of those to whom it belongs and those whom it is designed to protect.

"This is not an unfair illustration of some popular legal fallacies and their results; and it is desirable, therefore, that every one should know something of the law, and most of all those who wish to reform it. There is, moreover, at the present time especial need of popular instruction in legal principles. The world is being daily startled by new doctrines apparently subversive of law and society; and even such venerable institutions as property and contract are openly questioned and threatened with destruction. Without discussing whether these doctrines are right or wrong, it may be safely said that it is desirable that the public should know something of the principles which are being assailed, and upon which our laws have for ages rested without question or cavil. We do not, nor need any

one, shrink from reform, however radical, if it be deliberate and well considered. But every one must deprecate the hasty legislation which springs from passion, and the ill-considered measures which are born of prejudice and ignorance. And against such evils, a knowledge of law, of its history, policy, and principles, is perhaps one of the surest safeguards. Indeed, the principles upon which our judges mould and make the law, and their careful and patient method of reform, is a lesson which it behoves every legislator to lay to heart. And, indeed, it concerns us all, for it must be remembered that every one who votes, or influences a vote, is indirectly a legislator, and does something to make or mar the laws of his country.

The study of law moreover induces a habit of temperate criticism and respect for authority and experience. In these days of iconoclastic tendencies we can scarcely understand the deep reverence felt for law by our ancestors; but no

one who studies history, or law, which is the soul of history, can help feeling something of the spirit which animated our forefathers. No doubt it is true wisdom to submit everything to the test of practical utility. But, little as we care to question the wisdom of so doing, we cannot help feeling that it would be better at times did something of that spirit still remain, which prompted our forefathers to suffer with fortitude the ills of a venerable institution, rather than do violence to their feelings by breaking with the past.

The reason why ignorance of law is so prevalent among intelligent and otherwise well-informed persons is that, in order to acquire even an elementary knowledge of the subject, it is necessary to make it the object of systematic study. But life is short and occupations various; and the general reader, however strong his intellectual digestion, wants something he can rapidly assimilate, some easy means of escaping the grosser forms of ignorance, and

clearly cannot afford to spend any considerable portion of his time in floundering through text-books and law reports—

> "That codeless myriad of precedent,
> That wilderness of single instances."

The law, as Lord Mansfield said, "consists of general principles, illustrated and explained by cases." But those principles are nowhere clearly and systematically enunciated. They are indeed the very spirit and essence of the law; but in its outward and visible form the law is presented to us as "an enormous mass of isolated decisions and statutes assuming unstated principles, cases and statutes alike being accessible only by elaborate indexes." This gives to the law its vagueness and uncertainty, which could not perhaps be altogether removed without sacrificing its elasticity. Excellent as it is in substance, its form is gravely defective. This is perhaps partly due to the common belief among lawyers that all general propositions

of law are misleading, and to the consequent prejudice against all attempts to state the law simply. And no doubt it is a difficult matter to state a legal principle in a popular form. A popular view may be broad and simple, but it is generally loose; a legal view may be narrow and technical, but it is generally exact. The attempt, however, is perhaps worth making, even at the expense of some legal exactness. It may not be possible to treat law, as, for instance, Mr. J. R. Green has treated history; but it ought not to be impossible to deal with it in an untechnical manner, free from the air of the pedagogue. This method of treatment is becoming every day more common; and the world is beginning to discover that in order to teach it is not necessary to be dull, and that even an abstruse science is susceptible of popular exposition. It may, however, be fairly urged that there are few subjects less amenable to this kind of treatment than law.

It is the duty of the lawyer to regard law simply as it is, apart from what it ought to be or any other consideration; and unless this were so, the administration of law would become impossible. But real life is large and complex and many-sided; and the legal world, as compared with the world in general, is only a limited *coterie*, limited not only in point of numbers, but in point of the questions with which it has to deal. It is natural and proper therefore that the public should take a broader view, and regard law not merely as it is, but with reference to its object, its consequences, and its ethical value. At the same time it must be observed that whenever the public manifest impatience at the narrowness of view of the professional lawyer, it is generally because they fail to appreciate this first duty of those whose function it is to administer the law. This broad public view of law we shall ourselves endeavour to take in dealing with the subject; but since no one can alto-

gether escape the influence of his surroundings, we can scarcely hope to attain complete success.

Mere statements of law would be of little interest, and of still less use, to the general reader, even if they were not misleading, as is generally the case. We propose, therefore, to take some branches of law of more general interest, and explain the principles applicable to them, and the reason, object, and scope of such principles. And in so doing we shall endeavour, as opportunity occurs, to show that the policy of the law is wise and beneficent, that its principles are founded on sound considerations of justice and morality, and that law itself is but custom founded on common sense, or in other words is nothing but reason.

The present work, therefore, is not intended as a *vade mecum* to be carried in the pocket and consulted whenever occasion offers, but is designed rather to supply some popular information, and correct some popular errors and prejudices; and though there are few

things which are the object of so much prejudice as law, the prejudice is in most cases the result of ignorance. This in itself is an evil, but it has also the effect of weakening the force of law by tending to lessen the respect due to it, and so gives rise to an attitude on the part of the public which, though submissive, is not reverential—an attitude which has been well described by Martial in the lines:

"Yes, I submit, my lord; you've gained your end,
I'm now your slave that would have been your friend:
I'll bow, I'll cringe, be supple as your glove;
Respect, adore you, everything but love."

This reluctant submission is mainly due to the fact that the public do not see the *raison d'être* of the laws which they are bound to obey; and hence arises a prejudice which a slight knowledge of the reason and policy of the law would suffice to dispel.

Before proceeding to the special subjects selected for consideration, it may be well to

mention one popular fallacy which affects law generally, a fallacy which excites much popular prejudice, and which is due to the difference of view taken by the public and the specialist. There is a popular notion that the law is ever engaged in spinning fine webs of sophistry, instead of deciding cases according to common sense, which it must be confessed is sometimes common ignorance. If law is to be of any value at all it must be certain, as a very little reflection will prove; and it can only be certain by being uniform, and only uniform by a strict adherence to rules. In a complex state of society the rules must necessarily be complex, and in difficult cases can only be ascertained by the process of reasoning from analogy. And though this may in some cases occasion hurt to the individual, it is of course better that the individual should suffer than that the whole community should be prejudiced by the law's uncertainty. In this imperfect world, where all things human are necessarily fallible,

it is inevitable that human law should fall short of absolute justice. It is practically impossible to frame laws which shall meet the justice of every future case. The legislature, as every one knows, is quite unequal to the task; and it is only through the instrumentality of the judges and their decisions that the defects can be remedied, and the law brought into something like harmony with the growing wants of society. It is important, moreover, that the public should remember that the laws are made by themselves, and that the legislature and the judges are merely the means by which the will of the people may be ascertained. It is important that they should realise the fact that when the law presses harshly, as it must in some cases, it is not because of any perverse ingenuity on the part of the law or lawyers, but because of the inherent fallibility of human foresight; and that a hardship on the individual, though a partial evil, may be a benefit to the community, and

therefore a universal good. If the public could but realise all this they would take a much more charitable view of the law's defects, and there would be much less popular prejudice. Those defects, we repeat, are often due to the impossibility of providing for unforeseen circumstances; and if we could but foresee all that was going to happen, there are many things besides law which we might alter for the better.

## CHAPTER II.

### FREEDOM OF CONTRACT.

"Not what thou and I have promised to each other, but what the balance of our forces can make us perform to each other, that, in so sinful a world as ours, is the thing to be counted on."

CARLYLE.

WE have heard much lately about the "inviolability of contract;" but, though the phrase is a high-sounding one, it does not perhaps mean very much. It is used principally as a kind of protest against the paternal character of some modern legislation, which, it is thought, tends to interfere unduly with the liberty of the individual. What two or three adult persons deliberately agree upon among themselves is, so it is argued, a matter solely con-

cerning themselves, and ought not to be interfered with by the legislature or the courts. For, just as in ordinary affairs, a solemn promise, even though rash, is looked upon as a moral obligation, and ought in honour to be fulfilled; so a contract, deliberately entered into, is supposed to possess an inherent sanctity, which it is said no law ought to violate.

Now all this involves a rather nice question of casuistry which we do not pretend to solve. And, except that we may incidentally and superficially consider the question as affecting certain exceptional cases, we shall confine ourselves to a consideration of what contracts are inviolable rather than what ought to be so.

We have said that the phrase inviolability of contract does not perhaps mean very much; but this must not be taken to mean that we view with any great favour the extension of paternal legislation. All that is meant is that the principle has been so often broken through, both by the legislature and judges, that it

cannot now well be upheld. If the phrase means anything it means that a bargain is a bargain, whether fair or unfair, and that a contract, though unreasonable, has nevertheless a sanctity about it which ought to place it beyond the reach of outside interference. To such a proposition we cannot, however, give more than a very qualified assent; and we think it cannot now as a principle be validly insisted upon. Any sanctity which a contract may possess, it possesses surely by virtue of its reasonableness, otherwise we must be prepared to admit a sanctity in such contracts as that between Shylock and Antonio.

Contracts are so endlessly diversified, and the law relating to them so vast and technical, that it would be impossible to give any short summary of the subject that would be useful to the reader. We shall content ourselves with considering the principal cases in which the principle of inviolability of contract has not been upheld by law, or in other words

those cases in which contracts, though deliberately entered into, will not be enforced; and by so doing we shall, inferentially and negatively, show what contracts are good and binding.

It is a mistake to suppose that the law will enforce every contract into which you choose to enter, or that it will only hold you to those into which you have expressly entered. It will not on the one hand allow you to exact your pound of flesh, however carefully stipulated for; and on the other hand it will, in a proper case, saddle you with an obligation you did not bargain for. The law, contrary to general belief, is no slave to the letter, but regards the spirit, the object, and the tendency of contracts. In this, as in other respects, its aim is benevolent and wise, and founded on the soundest considerations of policy and morality. It will not enforce an unconscionable bargain nor one against public policy; but, on the other hand, it will in

many cases imply and enforce a contract to do that which ought in conscience to be done, though there be no express contract to that effect.

Of contracts which the law will not enforce, many instances will at once occur to the reader. Contracts to do that which the law prohibits, as, for instance, to commit a crime, are of course void; and the reader will hardly require to be told that contracts of an immoral tendency, such as a bond given by a man to a woman to induce cohabitation, cannot be enforced. It will also be taken for granted that fraud will vitiate a contract. And we need not do more than enumerate the principal Acts of Parliament which have raised the question of inviolability of contract by declaring that certain contracts shall be void, such as the Factory Acts, the Ground Game Act, and the Agricultural Holdings Act.

We may pass by all these as involving little difficulty, at least in principle, and shall confine

our attention to those contracts which are bad as being against public policy, and those which are vitiated by the relationship existing between the parties contracting; both of which classes involve broad principles of very general interest.

What then are the contracts which are against public policy, and what is public policy? The most familiar instances of such contracts are those in restraint of trade and restraint of marriage; but it may be said that all contracts which, if general, would have a tendency to injure the public interest, are against public policy. Whether a given contract has such a tendency can only be decided by the court on a careful consideration of its object and effects. In some of the older cases the judges took a very wide view of what is against public policy; but latterly they have shown a disposition to restrict the principle. It must not be forgotten, said Sir George Jessel, "that you are not to extend arbitrarily those rules

which say that a given contract is void as being against public policy, because if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider — that you are not lightly to interfere with freedom of contract."

Let us stay here for a moment to inquire how far freedom of contract, as an abstract principle and apart from other considerations, has been recognised by law. The most striking and familiar example of absolute freedom of contract is the bond in "The Merchant of Venice." Had it not been for the slip of the draughtsman, the bond in all its absurd and cruel freedom would have been enforced against Antonio. Such a bond could not of course

be valid in these days for many reasons; but it is going perhaps to the other extreme to say, as the law now says, that no penalty shall be recovered on a bond. A bond, as the reader is aware, is given to secure the payment of a certain sum, with a penalty attached in case the money is not paid. In early times, when the condition was forfeited, the whole penalty could be recovered. But the Court of Chancery long ago interfered in such cases, and prevented the creditor from claiming more than the amount of the damage he had actually sustained. This rule of equity was (by a course of proceeding very common in legal history) afterwards adopted by the courts of law, and ultimately by the legislature. And consequently, since the reign of Queen Anne, it has not been possible on the breach of a bond to recover the whole penalty. But this is not all; the principle has been carried even further. And by analogy the courts have held that where a man agrees to do a

certain act, and to pay a certain sum as ascertained damages in case of non-performance, that sum will in many cases be considered a penalty and cannot be recovered.

It is difficult to see in these latter cases any sufficient reason for not allowing freedom of contract; but since the principle has been thus departed from, even where it conflicts with no higher consideration, it must be taken to have been definitely abandoned as a principle of any intrinsic importance. There would, indeed, be some danger, were the law to go any farther, of the courts taking upon themselves the duty of making contracts instead of merely construing and enforcing them, and a danger of their relieving against mere hardship, which is in some sense an incident of almost all contracts. It must, however, be observed, that the latest decision shows a very decided disposition to restrict the tendency, and it has been judicially declared to be of the utmost importance that the law should maintain the

performance of contracts according to the intention of the parties, and that the courts should not overrule a clearly expressed intention on the assumption that judges know people's business better than people know it themselves.

The reader will now be prepared to accept the statement that a man cannot, even apart from immoral contracts, make what agreement he pleases, and will be prepared to hear that a very slight consideration will induce the court to refuse to enforce a contract on the ground that it is against public policy. As a first step to a knowledge of the law of contracts, we have thus far endeavoured to shake the common belief that every contract which is not immoral is good; and we shall now endeavour, as a further step, to induce the reader to view every contract with the jealous eye of an equity judge.

Contracts against public policy are those which have a mischievous tendency, a ten-

dency mischievous to the public welfare. No abstract rules can be laid down as to what constitutes a mischievous tendency. It is for the court to decide whether in its judgment a particular contract is against the public good, even though the grounds of its decision be novel. It has been questioned whether such a jurisdiction is not of doubtful and dangerous latitude, whether in fact the court may lay down new principles without the warrant of analogy. There seems, however, sufficient authority for saying that such a jurisdiction does exist; and we think its existence is absolutely necessary in order to explain the past and insure the future development of the law.

Contracts which have a tendency to interfere with good government, or with the administration of justice, are clearly against public policy; and we may pass by these to consider the more doubtful and interesting cases in which contracts have been held to be against public

policy, as tending to discourage the performance of moral and social duties, and as unduly limiting the freedom of individual action. And here it may be noticed that although freedom of contract is generally upheld on the ground of the right to individual freedom, freedom of contract has been curtailed because of its tendency to limit individual freedom. In other words, the reason for and the reason against freedom of contract are one and the same.

Certain kinds of agreements have been considered unlawful and void, as tending to the omission of duties which, though duties towards individuals, are such that their performance is of public importance. To this head may be referred the rule of law that a father cannot contract to deprive himself of the right to the custody of his children, or of his discretion as to their education. And though the law has been recently modified in this respect, the principle of the rule has not been impugned. For though such a contract by a father may

in some cases be enforced, it is practically only where his misconduct has made such a course desirable for the children's benefit. The public policy which requires a father to take proper care of his children has merely given way to another branch of public policy which takes children away from a father unfit to have the management of them.

Another case of the same kind is an agreement for the *future* separation of husband and wife. An agreement for *immediate* separation is, however, valid. It would seem at first sight that the latter agreement is clearly against public policy, it being the manifest duty of husband and wife to live together as a matter of public example and general welfare. This apparent exception may, however, be explained. In former times the primary duty of marriage, then regarded as a sacrament, was cohabitation, which was enforced by the spiritual courts, not on the ground of public policy but *pro salute animæ.* When the ecclesiastical courts

disappeared the chief objection to such contracts disappeared with them, and we can well imagine that any minor objections would be lost sight of. It may, however, be questioned, and the courts themselves may have doubted, whether it would be public policy to enforce cohabitation between persons who had found it impossible to live together; and this view seems to be supported by recent legislation and by the distinction drawn between immediate and future separation.

Marriage is regarded with much favour by the law, it being apparently considered the duty of every good citizen to get married. "I cannot name a greater moral obligation," said Lord Chief Justice Wilmot, "than matrimony, it being one of the first commands given by God to mankind, and ever since echoed by the voice of nature; and there cannot be a duty of greater importance to society, because it not only strengthens, preserves, and perpetuates it, but the peace, order,

and decency of society depend upon it." Any agreement, therefore, which tends to restrain marriage is against public policy; and consequently an agreement by a bachelor or spinster not to marry is void. So, too, is an agreement to marry nobody but A. B.; for that will not be construed as a promise to marry A. B., but is a mere restraint on marriage. "Persons," said the judge just quoted, "frequently are induced to promise not to marry any persons but the objects of their passion; and if the law should not rescind such engagements they would become prisoners for life, at the will of the most inexorable of jailors—disappointed lovers." It must, however, be observed that there are no very recent cases on the point; and it is perhaps doubtful whether judges of the present day would adopt without some modification the views concerning marriage taken by the ecclesiastical courts.

Contracts for promoting marriages for re-

ward, which we know as marriage brokage contracts, are also void, as being against public policy; for marriage should be the result of full and free consent, and such contracts tend to impede this freedom of consent and introduce unfit and extraneous motives.

Upon the same principle of public policy agreements in restraint of trade are void. Such agreements are void unless they are reasonable, and they will as a general rule be considered unreasonable if the restraint is general and not merely partial. But whether such an agreement is reasonable is for the court to decide on the facts before it; and the test to be applied is whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, or is so large as to interfere with the interests of the public. Wherever the restraint is larger than is necessary for such protection, it is oppressive, and in the eye of the law unreasonable. Freedom of trade is of more

importance than freedom of contract, and wherever therefore it can be shown that a contract interferes with freedom of trade the courts will interfere with freedom of contract. The reasons against restraints on trade are mainly that they interfere unduly with individual freedom; they deprive the community of services useful to it, and expose the public to all the evils of monopoly. The principal contracts in restraint of trade, which when reasonable are valid, are agreements by the vendor of a business not to compete with the buyer, agreements by a retiring partner not to compete with the firm, and agreements by a servant not to compete with his employer after his time of service is over. The question however, whether a restraint is against public policy does not arise only in these cases but in many others. And, to note an extreme instance, it was, in a recent case, argued that a contract by an inventor to sell what he might invent was against public policy,

on the ground that it would discourage inventions, for it was said that if a man knew that he could obtain no further pecuniary benefit from his invention, having already received the price of it, he would not invent; but it was decided that not only was there no rule of public policy against it, but a rule of public policy for it, because it enabled a man to devote his attention to research instead of being obliged to apply himself to some lower calling in order to get a livelihood.

Before leaving this part of the subject let us briefly refer to a case decided last year, which seems to conflict with the principles above enunciated. It was a betting case, in which a man employed an agent to back a horse; the horse lost, and the agent, having paid the bet, sued the principal for the money so paid. The Court of Appeal (Brett M.R. dissenting) held that the claim was good, on the ground that there was an implied contract by the principal to indemnify

the agent. But there is some reason for thinking the decision wrong. The contract was to do that which was clearly against the spirit and object of the Gaming Act, and was therefore impliedly prohibited and against public policy. And that in effect was the decision of the Master of the Rolls. The tendency of the decision is to encourage betting; and if a contract which encourages wagers is against public policy, which in view of the Gaming Act may surely be assumed, it seems to follow that the court, unless concluded by authority, which does not appear to have been the case, might have properly held the contract void on that ground. Had the principal himself made the bet, and having lost directed the agent to pay it, the case would have been different; but here the contract was to indemnify the agent against a contract which was void, and therefore did not exist. The mischievous tendency of the decision was at once shown by a case since decided, in

which the judge felt bound to follow it, though in so doing he indirectly sanctioned speculative dealings in bank shares which an Act of Parliament was expressly framed to prevent.

We will now in conclusion very briefly consider in what cases the courts will set aside contracts on the ground of undue influence. Wherever the consent of one party to a contract is obtained by the other under such circumstances that the consent is not free, the contract is voidable at the option of the party whose consent is so obtained. Freedom of consent is essential to freedom of contract; but in some sense it is antagonistic, for the protection which equity affords against undue influence is to that extent a limit to freedom of contract. In equity, persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, solicitor and client, confessor and penitent, are subject to certain presumptions when transactions between them are brought

in question; and if a contract or gift made in favour of him who possesses the influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. The principle is not, however, limited to the above-mentioned persons, but applies to all the variety of relations in which dominion may be exercised by one person over another. And just as the court has always refused to define fraud, so it has refused to enumerate the persons against whom this jurisdiction will be exercised. Wherever there is a relation which the court considers to be of a confidential nature, it is free to presume that an influence founded on that confidence exists. And the broad principle

upon which the court acts in such cases is that it will not allow the transaction to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. In short, to use a familiar and expressive phrase, the parties must be "at arm's length" when entering into the transaction.

But the courts have gone still further, and have refused to enforce contracts entered into under undue pressure, even where there has been no confidential relationship between the parties. Thus where a father gave security to a bank to cover the amount of certain promissory notes forged by his son, under threat of a criminal prosecution against the son, the agreement was set aside not only on the ground that it was an agreement to stifle a criminal prosecution, but also on the ground that the father acted under undue pressure, and was not a free agent.

Again, although the usury laws have been repealed, and notwithstanding the Act which provides that purchases of reversions shall not be set aside merely on the ground of under-value, the courts will still set aside bargains with expectant heirs and reversioners, unless it can be shown that the transaction was a fair one. Mere inadequacy of price, said Lord Hatherley, will enable an expectant heir to set aside (on terms) the sale of a reversion. And even on an ordinary sale gross inadequacy is a sufficient ground of relief, if, as stated by Lord Westbury, it be such as to involve the conclusion that the party did not understand what he was about, or was the victim of some imposition. Indeed, it may be broadly stated that courts of equity will set aside any transaction in which one party trades upon the necessity or weakness of another, and makes an unconscientious use of the power arising from the circumstances and conditions of the parties contracting. And

so in a recent case the court granted relief where a young man, though not an expectant heir, borrowed money on unconscionable terms from a money-lender. At the same time it cannot be disputed that a man may agree to pay cent. per. cent. if he likes, provided he be fully capable of taking care of himself, and the bargain be fully understood by both parties. The real question is, in every case, whether undue advantage was taken of the borrower's position, be it by reason of his extreme old age, great distress, infancy, want of proper advice, or what not.

We must here close a very cursory account of a wide and important subject. We have said enough to show that the courts have not treated the principle of freedom of contract as being entitled to any great amount of reverence. And there is no doubt that it can claim little or none when it conflicts with the righteousness of a bargain, or with individual freedom. At the same time it is

so valuable an economic principle, and so necessary to all trade and business transactions, that it ought not to be lightly interfered with; and it is only fair to point out that the most striking legislative interference in this respect, namely, the usury laws, was a complete failure. It is clear, however, that freedom of contract is liable to abuse, and therefore must be subject to restriction of some sort. But it may well be thought that such interference as is necessary may be left to the law courts. There are, says J. S. Mill, some things with which governments ought not to meddle, and other things with which they ought; but, whether right or wrong in itself, the interference must work for ill if government, not understanding the subject which it meddles with, meddles to bring about a result which would be mischievous. Again he says, in a passage well worth laying to heart at the present day: "The present civilisation tends so strongly to make the power of

persons acting in masses, the only substantial power in society, that there never was more necessity for surrounding individual independence of thought, speech, and conduct with the most powerful defences. . . . Hence it is no less important in a democratic than in any other government, that all tendency on the part of public authorities to stretch their interference and assume a power of any sort which can be easily dispensed with, should be regarded with unremitting jealousy. Perhaps this is even more important in a democracy than in any other form of political society, because where public opinion is sovereign an individual who is oppressed by the sovereign does not, as in most other states of things, find a rival power to which he can appeal for relief, or, at all events, for sympathy." And if this was true in Mill's time, how much more true must it be in our own.

## CHAPTER III.

### THE LAND LAWS AND THE LAND QUESTION.

*"Damnant quod non intelligunt."*

IT is daily becoming more common amongst certain classes to attribute all their ills to the land laws; and there are not wanting those who "darken counsel by words without knowledge," by teaching the people that all their troubles are due to this source. This, therefore, is a fitting time to diffuse some general knowledge of the subject.

No branch of law is so little understood or so subject to errors; and no errors are more wide spread or more deeply rooted. The intimate connection, moreover, which these

errors have with the political and social questions of the hour makes them, above and beyond all others, the most important and most mischievous of popular fallacies.

"The chief of these errors, and the one most deeply rooted, is the notion that a large portion of the land of this country is tied up and cannot be sold. And it is even supposed by many that a large quantity of land, consisting principally of family estates, must necessarily descend from eldest son to eldest son, in a course of perpetual succession, without the possibility of its ever being sold. All this to a lawyer is simply nonsense. A cursory perusal of a text-book, or a glance at the statutes, would suffice to dispel so erroneous a notion. Yet it is nevertheless a fact, not only that thousands of the unlearned believe in these fallacies, but that numbers of intelligent and otherwise well-informed people share them. It seems incredible to a lawyer that such error can exist

amongst any but the most illiterate; but we have almost daily evidence that it is not unknown even among our legislators.

The evils of entail as a restriction on the sale of land are constantly enlarged upon from the public platform; and it was but the other day that Mr. John Bright wrote: "In past times, and *now*, our land laws have been framed to protect the great estates of great families." Let us inquire how far this is the case, how far the saleability of land is restricted, and how it may be further facilitated.

There is happily no obscurity or difficulty about the law on the point. It rests upon no ambiguous statute or case of doubtful authority; but is clear, definite, and indisputable. Such a restriction on the sale of land there never is, there never has been—at least in modern times—and there never can be.

So far from there being any land which *must* necessarily devolve from father to son in a course of perpetual descent, there is no possible

means by which such a result can be secured. No land can be tied up for more than a generation—we say generation because the term will probably best convey to the general reader the extreme period within which land may be settled; but, to be exact, the period is the lives of any existing persons and twenty-one years from their death; and any attempt to exceed this period is ineffectual. Thus, a gift of land to the children of an *unborn* child will be void. There is, therefore, absolutely no land which is in its nature inalienable, and none which can be made so. Whenever land is tied up, it is tied up by the owner and not by the law; and no owner, however much he wishes it, can tie up his land for any longer period than the one mentioned.

The history of our land laws is made up to a great extent of a series of struggles between the landowners and the law courts; the former ever striving to tie up their land, the latter ever thwarting those aims. And as an instance

of the extreme disfavour with which the courts have ever viewed attempts to restrict the free disposition of land, let us briefly refer to an episode in the history of real property which may be of interest even to the general reader.

So far back as the reign of Henry III., or at least not later than the following reign, it had come to be law that where land was given to a man *and his heirs*, he could sell and dispose of it as he pleased, at least as soon as an heir was born. The curious result of this state of the law was, that the moment an heir was born, that is, the moment the person who was ultimately to take came into existence, that moment the owner could sell the land out and out, that is, he could sell not only what belonged to himself, but what belonged to the heir, and so defeat the rights of the heir. This state of things, for reasons we need not discuss, became so prejudicial that it was put a stop to in the reign of Edward I. by an Act which prevented a man from selling

his land so as to defeat the rights of his issue. This Act remained in force for about two hundred years; but the inconvenience of such a restriction became at length so intolerable that the courts sanctioned the following piece of "solemn juggling," which practically nullified the statute. A man in possession of entailed land was allowed to effect a sale in the following way: He got a friend to bring a fictitious action against him for the recovery of the land. The owner, in effect, allowed judgment to go against him by default; and the friend thus became possessed of an estate in fee simple, that is, of an unrestricted right to the land, and of course disposed of it according to the wishes of the original owner. This judicial proceeding continued to be the common method of dealing with entailed land down to the year 1833, when an Act was passed which enabled the same result to be attained by a simple deed enrolled in Chancery.

It is therefore several hundred years since there was any strictly entailed or inalienable land in England. But the remembrance of it seems still to linger in the minds of many people, and the notion of *heir land* that must perpetually descend from father to son is still to be met with. It is needless to repeat that such a notion is quite incorrect. In families where the estates are kept up from generation to generation, settlements are made every few years for the purpose; and even there the land which forms the subject of such settlements is subject to a power of sale, and therefore not inalienable. The object and effect of such settlements is not to make the land inalienable, but to prevent the family estates from being squandered. But so slight is the restriction allowed by law to be placed upon the free disposition of land that, even where settled, it is almost always possible for an eldest son to squander his patrimony and break up the family estates. If, therefore,

the keeping together of family estates is a public evil, a spendthrift son must be little short of a blessing to the community. At least this might be so were there any lack of land in the market; but when, as now, there are no purchasers, it is difficult to see how the splitting up of estates could be a benefit, public or otherwise.

The desire of individuals to keep up their name and memory has often been opposed to this restriction on settlement; and many shifts and devices have from time to time been tried to keep up a perpetual entail. But such contrivances have invariably been defeated by the law, and no plan is now possible by which land can be tied for a longer period than the one above mentioned.

It is therefore a fallacy to suppose that a large portion of the land of this country is the subject of perpetual entail. Such a thing can only exist by virtue of a private Act of Parliament, and is therefore exceedingly

rare. But the idea, though fallacious, has had its effect upon our land laws. All ignorance, when widely spread and deeply rooted, has an influence upon legislation. Popular errors are often the groundwork of public opinion; and against public opinion, however ill-founded, no institution can long prevail. Deplorable though it may be, it can scarcely be denied that there are occasions on which our High Court of Parliament, with all its wisdom and intelligence, sits to register the decrees of public opinion at the bidding of popular ignorance. And this, there is some reason to fear, may be the fate of our land laws. At present no harm has been done. On the contrary, the popular misconception has given rise to some useful legislation.

An Act has recently been passed enabling any person to sell settled land of which he is tenant for life. Before the Act, however, settled land could in most cases be sold, by father and son, or the trustees of the settlement.

But the Act was ingenious; for, without abolishing settlements, it exactly hit the fallacy that settled land cannot be sold. The practical effect of the Act therefore, though considerable, is not probably nearly so great as the public imagine.

One remarkable effect of the Act may be noted, namely, that it gives larger powers of disposition over land than exist over any other species of property. It gives to a tenant for life, that is, to an owner of part of the estate, a right to sell the whole. It does not allow the tenant for life to pocket the proceeds, nor to sell the mansion house without the consent of the court, though it has been recently proposed to do away with both of these restrictions. Subject to them, however, not only is there no restriction on the sale of land, and all land settled or otherwise can be sold, but the owner of a fractional interest can sell the whole. There is therefore practically less restriction on the sale of land than there is on the sale of goods

and chattels, a fact which ought to cause some surprise to the general public.

It is therefore clear that there is no such thing as absolute ownership in land. A man may sell his land, and he has the fullest power of doing so, but he cannot tie it up, except to the limited extent already mentioned. The popular notion that a man can do what he likes with his land and deal with it as he pleases is a fallacy. Neither in fact nor in law, neither in theory nor practice, has he any such right. The policy of the law is, and always has been, in favour of free disposition; and the rights of ownership have always been freely curtailed whenever they conflicted with such policy.

We have in the foregoing pages treated the subject of land law as though it consisted solely of the law of entail and settlements. But though this is of course not the case, it is to a great extent a fact that the popular misapprehension with regard to entails is the

one central fallacy from which all other popular errors on the subject spring. It would only mystify the general reader to go deeper into the subject; and to give a general outline of the law would but make its errors less salient and their exposure less easy.

It is necessary, however, to say something of primogeniture, which is intimately connected with entails, and not less unpopular. When a man dies without leaving a will, his lands descend to his eldest son. And this right of the eldest son to inherit his father's land is the primogeniture about which so much has been said and written. The term, however, is often also applied to the practice of settling estates upon the eldest son; and in the popular mind probably signifies the right or system or what not by which the land in some way or other goes to the eldest son. Now it is necessary to remember that this primogeniture is a mere custom, and it is purely optional with the owner whether he

allows it to take effect. It is not in any way a necessary incident to land, in the sense that the land *must* go to the eldest son. If the eldest son takes, he takes, not because the law insists upon his doing so, but because the owner of the land makes a settlement or omits to make a will. But it is not of course obligatory upon any man to make a settlement, and still less is it his duty to refrain from making a will. If, therefore, every man made a will, there would be no such thing as primogeniture in the strict sense. And if every one also abstained from making settlements, there would be no primogeniture in any sense. Primogeniture therefore is not compulsory, but rests entirely on the will of the landowner. And if it were abolished to-morrow the change would have little effect. We are well aware, however, that the primogeniture against which we hear so much is, like the law of entail, a mere popular chimera, and that when people rail against it it is

merely a way of advocating the compulsory splitting up of estates on the death of the owner; and as such it practically raises the same question as the abolition of settlements, which we shall presently consider. At present the law allows a man—not perhaps unreasonably—to say what shall become of his land after his death; and so long as this is so there will always be found individuals who will prefer that the bulk of their landed property shall go to the eldest son. Whether this is a mischief so great as to call for the abolition of wills of real property, or whether it is a mischief at all, we need not discuss. It is sufficient to say that both authority and experience seem to be in favour of the law as it now stands; and no advantage seems to be enjoyed in those parts of the country, such as Kent, where the law of primogeniture does not exist.

Let us now consider how far the saleability of land is restricted by the complicated nature

of the machinery by which it is transferred. And in dealing with this question there are one or two things which, though important to remember, are generally forgotten. It is in the first place necessary to remember that this is a legal question of very great difficulty, and not to be glibly disposed of by platform orators or paper theorists, but only to be satisfactorily dealt with by those who have spent their lives in studying the subject. In the next place it should be remembered that the cheap transfer of land is not everything; its safe enjoyment is also important, for land is not, like some much-advertised articles, only made to sell. And thirdly, it must not be forgotten that the transfer of land is simplicity itself compared with what it was a few years ago, and that it is daily becoming more simple, and would no doubt if left to itself work out its own redemption in a very few years. And this is shown by the fact that no institution has ever under-

gone such radical reform in a short time as the land laws in the last few years. The complaint in question originated under a state of things which has almost ceased to exist; but since the complaint has not lessened with its cause, but has increased in proportion as its reason has decreased, it is necessary to give it more attention than it probably deserves.

The complaint is one of expense. The ultimate aim and ideal of all ardent land reformers is to get the labourer to settle on the soil. Why then, it is naturally asked, do not the labourers buy some of the land which now gluts the market and which is so exceptionally cheap? and one answer is that the transfer is too expensive. What does this expense amount to? Roughly speaking, to about £4 per cent., and in many cases considerably less. Whether this is such an excessive charge as to deter any person from buying land who has the money, is a question which we may leave the reader to determine for himself, but we shall

for the sake of the argument assume that it is.

How then is this expense to be lessened and the complete saleability of the soil secured? And the answer, lightly given, is a proposal to make land as saleable a commodity as Consols. Generally, this is all that we are told, and nothing more. But it has been suggested, though the suggestion is not new, that this can be done by revolutionising the whole law of landed property; and, though we do not admit that even this would effect the object, we agree that nothing short of this would do so. It is proposed to abolish primogeniture, prohibit settlements, substitute bills of sale for mortgages, and cause all titles to be registered. It would be impossible in these pages to consider at length proposals so wide and vague, and in their details so technical. The serious nature of the objections would only become apparent in working them out, and no one but a lawyer can appreciate the immense diffi-

culties which would have to be contended with. Its object is to facilitate transfer by lessening the advantages of ownership, in other words, it makes land easier to acquire, but less valuable when acquired. For the sake of a slight reduction in the course of transfer it would take away all the advantages, and they are many, of the present system, and run the risks of evils compared with which the present cost of transfer is nothing.

But even if the need for such a scheme were clearly proved, if the technical difficulties were overcome, and the inconveniences disregarded, there would still remain a wide difference between the transfer of land and the transfer of Consols. They are essentially different in their nature, and must ever remain so. Land varies in quantity, changes its boundaries, and is, and must always be, subject to special stipulations and restrictions. If, therefore, we could do away with all technical difficulties, there would still remain the natural difficulties in the

way of complete simplification. The fundamental distinction between movables and immovables, with all its consequences, has always been recognised, and must always remain. If the advocates of such schemes really wish to see them carried out, they must bring in a bill declaring land to be as movable as furniture, and one acre of ground as good as another just as one pound of Consols is as good as another; they must also abolish, not only lawyers, but land surveyors and auctioneers, and also the stamp duty. If they can do this, they will go near to realising their schemes, but nothing short of this is likely to effect their object.

The fact is, such schemes are not advanced by those who are alone capable of carrying them out. If there is to be any radical change, it must be on the lines of such schemes as the proposal to pass an Act declaring that henceforward all realty shall be personalty, or the proposal to declare "all freeholds to be

leaseholds for ten thousand years, with reversion to the Crown." But this is not the place to discuss proposals of so technical a nature.

We do not shrink from reform on the subject, if it be wise and practicable. But before we can adopt any such revolutionary measures, it must be shown, not only that they are needed and are practicable, but that the framers of them appreciate the far-reaching consequences of such reforms. Every one must desire to see the transfer of land facilitated; and we certainly do not regard our land laws as a triumph of skilful simplicity. But we hesitate to make proposals on the subject, knowing how easy they are to make and how difficult to carry out. The following suggestions, however, may be put forward as the lines upon which, in our opinion, reform should proceed.

And in the first place by all means abolish primogeniture, in the strict sense of the word. It is of little or no value; it often causes hardship, and has always caused an immense

amount of error and prejudice. And in legislating on a subject of this kind it is always desirable that the change should be a reform, not merely in fact, but in popular imagination. Let land on the death of the owner be considered and treated as personalty. For similar reasons we should propose to do away with entails, by changing estates tail into estates in fee. The change would cause little inconvenience, and would greatly relieve the public mind. Again, we think it practicable, and if so certainly desirable, to do away with the legal estate, to the extent at least of abolishing uses. It is an anomaly which gives rise to difficulty and expense out of all proportion to its value. We think the Conveyancing Act might be further extended by necessarily implying those things which are now implied at the will of the vendor. We think titles might be limited generally to twenty years or even less; and that the Limitation Act might be even still further extended.

And lastly, notwithstanding the failure of all optional registration, we are in favour of some sort of compulsory registration, not necessarily of all existing titles, but of titles on future sales. There is one other point to which reference may be made which, though not a question of law reform, affects the cheap transfer of land. We mean the stamp duty on conveyances. If one-half of what is said as to the importance of cheap transfer is true, the stamp duty ought surely to be greatly reduced or abolished altogether. Parliament cannot admit the urgent need for cheap transfer and at the same time retain the tax upon it.

There remains only the question of land holding or tenure, in its varied forms, for the term is applied, though not with much propriety, to land nationalisation, peasant proprietors, the three F's, and some other less drastic measures. These questions, however, concern the political economist and the agriculturist rather than the lawyer. They are

moreover rather the vague dreams of discontent than the threshed-out schemes of practical reform. We may dismiss the nationalisation scheme by saying, on high authority, that it would benefit temporarily the public to the extent of 43*s.* a head, at the expense of ultimately ruining credit, industry, and therefore the country. We may pass by peasant proprietory with the remark that its operation on the Continent is not such as to favour the idea that it would benefit the rural population or tend to agricultural prosperity, and that the instances often pointed to as being successful are not true instances of present proprietors, but of artificers' allotments. And we come to the three F's, or rather the modification of the principle proposed to be applied in England. At first sight nothing could be more taking than Mr. Fyffe's suggested reforms in this direction. To secure to the tenant the result of his own industry, to protect him against capricious eviction and oppressive rent, are

surely objects which we all desire. But the wise object of all such measures is not so much to benefit the tenant as to benefit agriculture; for it is only by benefiting the latter that you can ultimately benefit the tenant. Would such a scheme therefore benefit agriculture? That is the one question, and it is one we do not pretend to answer. Mr. Fyffe says it would; but others, of at least equal authority, say it would not. And even radical reformers have asserted that it goes beyond both the necessities of the case and the desires of the agricultural classes. But the question, though one of tenure, is not a legal question, and must be left to agriculturists. The question, however, of rent affects in a general way urban as well as agricultural property. And as a general principle we should be inclined to say that all rent in the form of ground rent and rent charges is an evil. In saying this we do not countenance confiscation, but merely suggest the

prohibition of building leases for the future. Might it not be desirable to prohibit all leases beyond, say twenty-one years? That would do something to diffuse property, and widen the influence of the "magic of property," which the leaseholder can never feel. To advocate the dispersion of property and believe in the "magic of property" may seem inconsistent with a disapproval of peasant proprietors; but it is not so. We all desire to see land more widely diffused, and peasant proprietorship tried as a matter of private enterprise; and every one is in favour of small allotments as a supplement to wages. But it is quite another thing to suppose that men can somehow be planted out on the land, and that thousands of families can get a living for themselves in this way.

All such schemes, however, are not so much proposals of law reform as proposals to shift the foundations of property. They are at present mere dreams, and not only impracticable, but would be injurious to the commu-

nity, and therefore to the class whom they are designed to benefit. No change in the tenure or ownership of land will bring about the Utopian results claimed for such schemes. Much may no doubt be done in the way of law reform, so as to give every legal facility for such natural action as will bring about the greater diffusion of land. But all such reforms, unless they are to result in mischief, must be carried out by those who have some knowledge of the land and some knowledge of the law, and who can appreciate the enormous difficulties that will have to be contended with. No reform, however meritorious its immediate object, can be considered wise which is framed without reference to its far-reaching consequences; no scheme, however well-meaning, can be otherwise than mischievous, which disregards economic and commercial principles; and no class can be permanently benefited by a measure which is injurious to the country generally.

The mischief of such schemes is not the danger of their being ever carried out, but the false hopes which they raise and which in the nature of things can never be realised. There are certain natural laws and forces in the world ever working towards their inevitable results, which are as uncontrollable by legislation as the law of gravitation. And it is because, and in proportion as, such schemes seek to control these natural forces that they are impracticable and doomed to failure.

## CHAPTER IV.

### LIBEL AND SLANDER.

"All slander
Must still be strangled in its birth; or time
Will soon conspire to make it strong enough
To overcome the truth."

DAVENANT.

NO legal proceedings excite so much interest as actions for libel. Indeed, any action which involves a scandal, however personal and private, absorbs for a moment all public attention, and becomes the one engrossing topic of conversation. An action against a peer's son for breach of promise, an action against a judge's son for libel, have each in turn sufficed to throw into the background all questions of state and matters of the gravest

political importance. We live, it must needs be confessed, in a scandal-loving world.

Deep, however, as is the interest displayed in libels, the law on the subject is little understood, and the popular notions regarding it are vague and fallacious. It is, however, important that every one should know something of the subject, or at least know in a general way what constitutes a libel; for it is evident that such knowledge may be the means of saving a person from much personal inconvenience, and may further enable him, if he must give vent to his feelings, to relieve them by the discriminate use of non-libellous epithets.

The popular notion of a libel is an untrue statement. In other words, a libel is synonymous with a lie; and in popular language the two are convertible terms. Thus, when a person is wrongfully accused it is commonly said that you libel him. This, however, is not a correct definition in a legal sense, for a state-

ment though true may yet be a libel, and a statement though entirely false may not be actionable. The true test of a libel, therefore, is not its untruthfulness, for neither in this nor any other instance does the law take notice of mere falsehood apart from the damage actually or presumptively caused by it.

Neither is it material with what intention the words are uttered, for though you make a statement with the best intention in the world, though your purpose be high and your motive lofty, it will avail you nothing if the words be libellous. There are, indeed, certain persons, as we shall presently show, to whom you may make a *bonâ fide* statement of a libellous nature; but apart from these you may not in law convey your suspicions to even your nearest and dearest friend, however important it may be that he should know them. It is the natural impulse of a kindly feeling to put a friend on his guard against a doubtful character; but it is clearly a dangerous

proceeding. For the kindly feeling that prompts a disinterested action is in this as in many other cases often visited with a penalty instead of a reward.

Every one has a right to have his good name maintained unimpaired. And though as a matter of fact his name may be anything but good, the law will assume otherwise until the fact is proved. The whole world may agree that a man is a rascal, but you will not be allowed to publish the fact unless you can strictly prove that such is the case. And we need hardly add that it is one thing to know that a man is a rascal and quite another to prove it to the satisfaction of a court of law.

We have used the word "libel" in an untechnical sense as meaning a mere defamatory statement; but in law the term is confined to a statement which is written or printed; a defamatory statement which is spoken being a slander. There is considerable difference

between the two. The law looks upon libel as much the more serious offence; and the presumption that words are defamatory arises much more easily when they are written than when they are merely spoken. Many words which are clearly defamatory when written and published may not be actionable when merely spoken. And here it may be well to state, what we shall explain more fully further on, that the publication of a libel or a slander, which is in both cases necessary, is nothing more than the communication of the defamatory words to a third person.

The gist, then, of a libel or slander is its tendency to injure the reputation. It is not necessary that the words should injure a man's pocket, but on the other hand they must clearly cause him something more than mere personal annoyance or unpleasantness. There are some words which on the face of them *must* clearly be injurious to the reputation; and where such words are used, the law will assume that they

are injurious, and will not require proof that any particular damage has followed. On the other hand there are words that merely *might* tend to produce injury to the reputation, and in those cases it is necessary to prove that some appreciable damage has been caused by their use.

It is almost impossible to say what words of disparagement will not, if written, constitute a libel. Any words which are disparaging to a man, any statements which expose him to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbours are libellous, and therefore actionable.

In the case of slander it is somewhat different; the law will not as readily assume damage. Mere disparagement is not enough. The words must either be clearly injurious, or it must be proved that some appreciable damage has resulted from their use. Where the words are on the face of them injurious,

the law will assume damage without proof. Thus, if the words spoken charge a man with a crime—indictable offence—or impute to him a disease tending to exclude him from society, or are spoken of him in the way of his office, profession, or trade, they will be presumed to be damaging to his reputation. But in all other cases of spoken words, it must be shown that appreciable damage has directly resulted from their utterance.

We have said that everything that is disparaging is a libel, and the reader will probably think the description somewhat vague and sweeping. Vague it is no doubt, but it is impossible to define it with greater precision. And though it is certainly sweeping, it is not more sweeping than the cases justify. It must, however, be borne in mind that there is a great distinction between remarks aimed at a man's private and personal life, and those addressed to his public work and character, and that what would be a gross libel in

the one case would only amount to fair criticism in the other.

The reader will best acquire some notion of what is a libel by considering the cases in which certain doubtful expressions have been held to be libellous. And in giving instances of defamatory statements we shall confine ourselves to those extreme cases which mark the limits between fair comment and libellous expressions; for it is manifestly unnecessary to cite cases in which violent abuse has been held to be actionable. Nobody, for instance, doubts that it is libellous to write and publish of a man that he is "an infernal villain," or that he is "the most artful scoundrel that ever lived," or that "he is at the head of a gang of swindlers." There is no doubt that such statements are disparaging. Neither would many people be inclined to doubt that such expressions as a hypocrite, an impostor, a rogue or a rascal, are libellous. And few would be surprised to hear that such expres-

sions as "a frozen snake," a "mere man of straw," and "an itchy old toad," are equally so. But it is a surprise to learn that it is libellous to charge a man with ingratitude or intolerance, to say that he was once in difficulties, to say of your sister that it is a pleasure to her to put you to all the expense she can, to say that a lady of position has her photograph taken incessantly morning, noon and night, and gets a commission on the sale, or to paint a man playing at cudgels with his wife. But on the other hand we are not surprised to learn that it is no libel to publish that a man has sued his mother-in-law in the County Court; or to write of another as "Man Friday," for as Lord Denman observed, Man Friday was a very respectable man, though he *was* black. But though in both these cases it was held that there was no libel, the fact that they called for judicial decision shows how very slight a disparagement is sufficient to raise the question.

The question, however, of whether there is a libel depends upon the facts of each case, and the whole statements must be taken and read together. An isolated expression cannot be considered apart from the context, for if there be both praise and blame, the praise may predominate, and the libel be destroyed. The bane must be taken with the antidote, and the result determined. Thus if you call a man a thief, that is undoubtedly a libel; but if you go on to explain that he only steals kisses, there is probably no libel, for kisses cannot be the subject of larceny at common law.

Again an expression, though harmless in itself, and *primâ facie* innocent, may be used in a defamatory sense; and if under the circumstances it is understood by the ordinary reader in that sense it will be actionable. Thus, to describe an attorney, in ironical praise, as "an honest lawyer," is actionable; and so it is to describe him as a daffydown-

dilly. It is conceivable, therefore, that under certain circumstances it might be actionable to "damn with faint praise," or to "hint a fault or hesitate dislike." And we are not prepared to say that it would in all cases be safe to

> "Convey a libel in a frown,
> Or wink a reputation down."

It will thus be seen how slight a reflection on private character is sufficient to constitute a libel. But it is very different with regard to matters of public interest. Upon these every one is allowed to comment in the freest possible manner. We daily see the partisans of each political party attacking one another with something very like libellous vituperation. Yet they do so with absolute impunity. For no condemnation however sweeping, no animadversion however severe, no criticism however trenchant, will be considered libel, if addressed to matters of public interest. He who seeks notoriety invites criticism; and he who takes

office accepts misrepresentation. And it is wisely ordered that such free criticism, though greatly abused, should suffer no check or hindrance, since it is the great safeguard for the proper discharge of public duties. Such criticism, however, has its limits, and will not be allowed to impute wicked or corrupt motives, even to a public official. Though it may be added for the satisfaction of the Opposition of all time, that it is not libellous to impute wicked, or at least selfish, motives to members of Her Majesty's Government.

So, too, a man who publishes a book or exhibits a picture must be taken to challenge public criticism, and he cannot complain if that criticism is unfavourable, however severe, if it does not impute corrupt motives. One example must suffice. Mr. Ruskin, in criticising some pictures exhibited by Mr. Whistler at the Grosvenor Gallery, wrote that "Sir Coutts Lindsay ought not to have admitted works into the gallery in which the ill-educated conceit

of the artist so nearly approached the aspect of wilful imposture. I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask 200 guineas for hinging a pot of paint in the public's face." The jury considered the words "wilful imposture" as overstepping the line of fair criticism, and found a verdict for the plaintiff; damages, one farthing.

We have said enough to show how slight a reflection on private character will constitute libel, let us turn for a moment to slander, and see how it differs from libel. It has been already said that words when merely spoken are not actionable, unless they impute a crime or contagious disease, or touch a man in his office or profession. If the words spoken do not go to this length, they will not, unlike the same words when written, be actionable, unless special damage has been caused.

It is sufficient, however, as regards crime, to make a general charge. Thus to say to

a man in the hearing of a third person, "If you had your deserts you would certainly be hanged," is a slander. And as regards disease, it must be the imputation of some very frightful disease, like leprosy or the plague, to be a ground of action.

What words will so touch a man in his office, profession, or trade depends very much upon the position of the man. Thus it is not necessarily, nor indeed generally, slanderous to call a man a rogue, a cheat, or a swindler, for there are many trades, and perhaps some professions, in which a man may be thoroughly successful and yet a cheat and impostor. This curious reason for the immunity of such expressions when spoken is not, as one might suppose, a mere humorous suggestion, for it has been gravely held that it is not a slander to call a successful tradesman "an infernal rogue," and for analogous reasons it is not libellous to call a newspaper "the most vulgar, ignorant, and scurrilous journal ever published,"

since that, it is assumed, not without some reason, will not necessarily diminish its circulation.

To say of a trader that he is insolvent, or of a professional man that he is wanting in skill, is of course a slander; but to impute to either immorality would not, unless it could be shown that such imputation caused pecuniary loss. The words must impeach a man's professional skill or official conduct. Thus it is a slander to say a lawyer "knows no more law than a cow;" but you may call a justice of the peace a fool, ass, or blockhead with impunity, for no special ability is expected from a justice of the peace, and such words do not impeach his integrity or impute corruption.

It is immaterial, as we have already stated, with what intention or in what sense the words are used. The one question is in what sense are they understood by those who read or hear them? To such an extent is this the

case that a man may use words in a defamatory sense, yet if they are not so understood there will be no slander. How little intention has to do with a libel is shown by the following case: The printers of a newspaper by mistake in setting up the type placed the name of a firm under the heading, "First meetings under the Bankruptcy Act," instead of under "Dissolution of Partnership," and, though an ample apology was inserted and no damage was proved, it was held that the publication was libellous and the damages (£50) not excessive.

Merely composing a libel or thinking a slander is of course not actionable. The words must be published. But publication in this sense means nothing more than the making it known to some third person, and the making it known to one individual is enough. It is of course no libel to communicate the words to the person defamed, for that cannot injure his reputation. His own good opinion

of himself is not likely to be lowered by your "home truths;" and he has moreover an opportunity of vindicating his character by something more forcible than mere verbal refutation. But though to compose a libel which you do not publish is not actionable, it is clearly actionable to publish a libel which you have not composed, and every repetition of a slander is of course a fresh publication of it. Even publication to a wife is sufficient; for, though husband and wife are generally regarded in law as one person, you will not be allowed to repeat to a wife the unpleasant things you have heard concerning her husband. On the other hand it has, curiously enough, never been decided whether you publish a slander by repeating it to your own wife. And the fact that the point has never arisen is cynically explained by the assumption that in every such case the wife immediately publishes the scandal, or an exaggerated version of it, to some third person.

The truth of a libel or slander is a complete

defence to an action, though it is not so in a criminal proceeding, for there it is necessary to show not only that the libel was true, but that it was for the public good that it should be published. The truth, when relied upon as a defence, must be pleaded and proved, and the whole libel must be proved true, not a part merely. It is not, moreover, sufficient to prove facts which to the ordinary mind would justify the libel; it is necessary to prove that what was said was actually and strictly true. Thus, if you wrote that "Jones said that Smith was a convicted felon," it would be of no avail to prove that Jones did in fact make that statement; you must prove that what Jones said was actually a fact. Again, it would not be sufficient to show that Smith had been convicted of felony and sentenced to imprisonment; it would be necessary to show that he was enduring the punishment when the words were uttered, for a felon who has undergone his punishment is in law

no longer a felon. Again, if you call a man a libellous journalist it is not sufficient, as you might naturally suppose, to prove that he had in fact libelled one man who had recovered damages against him. It may be gathered therefore how difficult it is to justify a libel, especially when we consider how great is the tendency of all scandal to go a little beyond the truth and to say too much.

Words used on certain occasions are privileged, and are consequently not actionable. The privilege may be absolute, as in the case of parliamentary or judicial proceedings, or qualified only—qualified, that is, in the sense that they are privileged only if used *bonâ fide* and without malice. The cases of absolute privilege present little difficulty, as they are clearly marked out, and the words are privileged, though spoken falsely and with malice. But in the case of qualified privilege it is almost impossible to say under what circumstances words will not be privileged if used

from a sense of duty. If you honestly make a statement, even though false, from a sense of duty, moral or social, it will be privileged. It is often supposed that in order to constitute privilege, there must be some relationship existing between the parties, as in the case of master and servant, father and child, solicitor and client, and other cases where trust or confidence is reposed by one in the other. But privilege is not confined to these cases. It may exist between strangers. Thus, if a stranger asks you as to the character of a servant or tenant, or a professional man or tradesman, your answer if honestly given will be privileged. Nor is this all, for there are cases in which you may go of your own accord to a stranger and give him information which he has not asked for; and in such cases the information, if honestly given, will be privileged. In all these cases the question is whether the defendant acted from a sense of duty, though it is very difficult to define what

circumstances will impose such a duty. "It is a question of moral or social ethics;" and it is for the jury to say whether the defendant acted in the execution of what he honestly believed to be his duty. But it is not a man's duty to repeat a statement simply because he honestly believes it to be true; and if he makes a statement recklessly, without knowing or caring whether it be true or false, it will be evidence of malice to go to the jury, though the statement be made to a relation or in answer to inquiries.

And here we must leave the subject. The moral of it all is that "he that refraineth his lips is wise," and that silence is indeed golden. It may be difficult to steer a middle course between the worldly prudence which says too little and the honest indignation which says too much. But generally speaking, right feeling and honest purpose will be found to be safe guides in the matter. There is, perhaps, in the present day too great a love of scandal,

as evidenced by what are called society journals; but on the other hand there is too great a disinclination "to speak out boldly, scorning consequence." The law, however, is not to blame in either case. It has already gone sufficiently far in extending the meaning of libel, and, on the other hand, it has allowed the protection of privilege to its fullest possible extent.

## CHAPTER V.

### CUSTOMS, CLUBS, AND THE STOCK EXCHANGE.

"Ex non scripto jus venit quod usus comprobavit: nam diuturni mores consensu utentium comprobati legem imitantur."

CUSTOMS may be defined as the laws of laymen, as distinguished from the laws of lawyers. And these, when sufficiently certain and reasonable, are recognised and enforced by courts of law. If any branch of law could have a special attraction for the general public, it ought surely to be this; for it must be gratifying to the public to know that it can not only make its own laws without the aid of Parliament or judges, but can actually override the law of the land by its unwritten customs.

In dealing with the subject we may confine ourselves to those special customs known as particular customs, such as customs of the country and customs of trade, and to the analogous cases of rules laid down by certain bodies for the regulation of their members, such as for instance the rules of the Stock Exchange. And in all these cases the custom or rule is, with some limitations, recognised by law as binding, though it forms no part of the law of the land.

All law, however, it must be remembered, is nothing more than custom solidified by statute or crystallised by judicial decision, and was, it has been somewhat grandiloquently remarked, "at one time in an amorphous form of heterogeneous custom." The usages which common-sense and reason have prescribed as the rules by which men's conduct is to be governed are not only the origin of law but the law itself. It is only in an ironical sense that we hear the law described as the embodi-

ment of common-sense and the perfection of reason; but these hackneyed definitions are literally true. For the customs and rules which the common-sense and reason of mankind adopt for their convenience, are, when reasonable and certain, stamped with the authority of the legislature or judges, and become law. And even before they are so stamped they are practically part of the unwritten common law, and are ready to be declared such at any moment that the occasion offers. It is possible, therefore, without sarcasm to say that law is the perfection of reason, and that "what is not reason is not law."

This origin of law is often lost sight of even by lawyers; but it is well to bear it in mind, lest our views of law become unduly narrowed. It is startling, even to a lawyer, to find, as he occasionally must do, that some well-worn doctrine or never-questioned principle is not to be found in any

written statute, but depends upon immemorial usage for its support. Such common doctrines, for instance, as those relating to the descent of land, the transfer of property, and the construction of wills, though embodied in quite recent legislation, have for centuries been recognised as undoubted law, though they can be traced to no more certain origin than common usage.

It must not, however, be supposed that every custom which is universal is necessarily law. And just as a lawyer may be startled to find his most homely principle without authority, he may be startled to find his every-day practice against authority. It is unquestionable, for instance, that a deed requires sealing and delivery, though no original authority for the practice is to be found. But though it is the universal practice to sign deeds, there is the high authority of Mr. Preston and Mr. Joshua Williams for saying that signature is unnecessary. But generally speaking, a custom

which becomes universal and is approved by the community, will eventually become law. And thus the law is brought into harmony not only with the requirements, but with the sentiments, of society.

"Customs," Mr. Disraeli once said, "may not be as wise as laws, but they are always more popular." This simple observation points to the inherent defect of all written laws. Customs, as compared with law, are uncertain and ill-defined, but they are flexible; laws, on the other hand, are certain and clearly defined, and for the time being wise; but they are, as compared with customs, rigid. Customs float up and down the tide of men's affairs with perfect buoyancy; but laws, unless carefully watched and tended, are soon left high and dry or totally submerged by the ever-flowing sentiment of the age. Custom, therefore, is the more popular; and law, when not antiquated, the more wise. Custom, indeed, if it could be made certain and definite, would

be an ideal law. But certainty and flexibility are incompatibles, which in a high degree can never be blended. Law, therefore, like so many other things in this world, is a compromise. Of customs in general, however, enough has been said. "Hereof," to use the words of Coke, "much more might be said, but it belongs unto others."

Let us now proceed to consider particular customs, and how far they are recognised and enforced by law. Particular customs are those which obtain amongst certain classes, or in certain localities, such as customs of the country and customs of trade.

Both customs of the country and of trade have in some instances been confirmed by Acts of Parliament, and these we pass by as being part of the law of the land. Such are the custom of *gavelkind* in Kent, by which lands descend to all the sons equally; and the custom of *borough-English*, by which the youngest son inherits; the reason of the

latter being, as is supposed, that "the lord of the fee had antiently a right of concubinage with his tenant's wife on her wedding night;" a fact which, if true, shows how long a custom may survive the reason of its birth. Such also are the customs of the City of London. But apart from these, all particular customs are contrary to the general law of the land, and are good only by special usage.

When a custom of the country is actually proved to exist, the next inquiry is into its legality; for if it be not a good custom, it will not be recognised by the courts. In order that a custom may be valid it is necessary: (1) That it should be an ancient custom; (2) That it should have continued without the right being disputed or interrupted; (3) That it should be reasonable, or rather, not unreasonable, "for it sufficeth if no good legal reason can be assigned against it;" (4) That it should be certain; (5) That it should not be incon-

sistent with another custom or with an Act of Parliament.

Practically speaking, however, the only questions that arise in the vast majority of cases are whether the custom actually exists and whether it is reasonable. And whether it is reasonable is often a difficult question, which it is for the court to decide, and which can only be decided with reference to the circumstances of each case.

Even amongst lawyers a good deal of confusion exists on the subject of customs; and it is necessary to distinguish local customs from rights of common on the one hand, and from customs of the country and trade on the other.

The most familiar instance of a local custom is the enjoyment of rural sports on a village green. Thus a custom for the inhabitants of a parish to enter upon certain land in the parish and erect a maypole and dance round it and enjoy any innocent recreation at any

times in the year, is good; though it might well appear to some people unreasonable to set aside the rights of property for the purpose of encouraging so primitive a pastime. On the other hand a custom for the inhabitants of a parish to exercise horses at all seasonable times in a place outside the parish is bad. These are the only two cases that have been decided of late years, and they throw little light on the subject. In an earlier case the House of Lords seemed to think that such cases rested on an implied dedication to the public. But as a dedication cannot be made to a *part* of the public it is difficult to see how this could be. It may be added that village greens and recreation grounds have been protected by recent legislation.

It must here be noticed that although *inhabitants* of a place may set up such a custom as we have just mentioned, they cannot, as *inhabitants*, set up a claim to rights of common by custom. Thus, they could not claim a

custom to cut underwood for fuel. Such a right could only be claimed *as a custom* by copyholders; and, though such a right might be claimed by a corporation, it could only be by virtue of a grant and not by virtue of a custom, though immemorial usage would be evidence from which to imply such a grant. This subject, however, is too difficult and technical to pursue further.

Customs of the country and customs of trade are much more simple, and stand on an altogether different footing. They are not rights acquired by long usage, but simply customs of husbandry or trade observed in the district or trade to which they relate. They differ from what may be called immemorial usages in being implied contracts rather than ancient rights, and indeed may be of quite recent origin, and may change from time to time.

Agricultural customs principally relate to the allowances or compensation to be made to outgoing tenants, and in accordance with these is

determined what ought to be paid by the landlord or incoming tenant in respect of away-going crops, tillages, manures, and the like. The subject has been recently dealt with by the Agricultural Holdings Act, 1883; but that Act mainly deals with the larger kind of improvement, and affects hardly at all the smaller matters with which agricultural customs are principally concerned. These customs are very numerous, varying with almost every county, and even with different parts of the same county. The area of the custom is immaterial. It is not necessary to show that it is general in a particular county or a particular parish; it is sufficient if it be proved to be general in the locality where the land is situated, though the law will not recognise a custom observed merely on a particular estate. All that is required is that a certain usage should exist among the agriculturists of the neighbourhood, and if this be shown, the landlord and tenant will be bound by the usage unless they make a

94619

bargain expressly or impliedly excluding it. It will in short be considered as tacitly incorporated in the lease unless expressly excluded, or impliedly so by being inconsistent with the terms of the lease.

It is the usual practice all over England for the incoming tenant to pay the compensation; but, this notwithstanding, it is the landlord and not the incoming tenant who is liable for such payment. And it has consequently been held that a custom that the outgoing tenant shall look to the incoming tenant for payment, to the exclusion of the landlord's liability, is unreasonable and therefore bad. An outgoing tenant therefore cannot sue an incoming tenant on such a custom.

Customs as between landlord and tenant are not however confined to compensation, but may relate to other matters. Thus, in a case decided only the other day by the House of Lords, it was held that a custom, which had grown up within the last thirty or forty years, of allowing

tenants to take away the flints, turned up in the ordinary course of husbandry, and sell them for their own benefit, was a reasonable and valid custom.

It will be noticed that in these cases the law of the land is overridden by the custom. The law says that the land, and all that it consists of, and all that is put into it, shall belong to the landlord; but the courts allow this general principle to be modified by custom, partly because it is only just that he who sows should reap, and partly because such customs are for the benefit and encouragement of agriculture.

Analogous to these customs are the usages of trade. In both cases the custom or usage is allowed to add to or explain the written contract; though in neither case is it allowed to *vary or contradict* the written instrument. In both cases it is presumed that the parties did not mean to express in writing the whole of the contract, but to contract with reference

to the known customs. And consequently such customs will only prevail when they are not expressly or impliedly excluded by the written contract.

Most trades have their particular customs, which may be proved by evidence in a court of law, but such commercial usages must not be confused with the general custom of merchants, which is part of the law of the realm, and the knowledge of which resides in the breasts of the judges. Such trade usages are allowed to attach special meanings to trade expressions, and to define the liability of parties to commercial transactions.

Thus, to mention a recent case of general application, on the sale of goods by a manufacturer, who is not also a dealer in them, there is, in law, an implied contract that the goods shall be those of the manufacturer's own make. But if, in such a case, it could be shown that there was a custom of the trade to supply goods of other makers, then the implied contract

would be changed in accordance with such custom.

The most important commercial customs are those relating to agents, underwriters, and brokers; and perhaps the most interesting are those relating to the Stock Exchange.

The rules of the Stock Exchange, like the customs of any other trade, are binding so long as they are reasonable and legal, and are binding, not only upon its members, but upon those dealing with them. And many questions have arisen as to how far those rules are reasonable, and how far members of the Stock Exchange can avail themselves of those rules to escape liability. The general principle applicable to the Stock Exchange, as well as other trades is, that a person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to

the usage of that place. But the rules of the Stock Exchange, being the rules of a domestic forum, cannot affect persons who are neither members nor their clients. Thus they cannot affect the rights of the general creditors of a defaulting member. A defaulting member, therefore, cannot voluntarily pay money to the official assignee to be distributed exclusively amongst those creditors whose claims arise out of Stock Exchange transactions, for that is a fraud upon the general creditors. And if it be urged that that is the rule of the Stock Exchange, the answer, as Lord Justice James said, is that the Stock Exchange is not an Alsatia, the Queen's laws are paramount there, and the Queen's writ runs even into the sacred precincts of Capel Court. But the official assignee may lawfully distribute among Stock Exchange creditors the money which he receives from those members who owe differences on their contracts with the defaulter, for that is an artificial fund created by the rules, and

does not form part of the general assets of the defaulter.

According to the usage of the Stock Exchange a buying jobber is at liberty by a given day, called the "name day," to substitute another person as buyer and so relieve himself from further liability on the contract. And this is a reasonable usage, founded on general convenience. And the purchase or sale of shares made by one who is not a member, through a broker who is a member, will be treated as made subject to such rule. But the name so given must be that of a person *able* and willing to purchase; and if the name given is that of a non-existent person, a lunatic, an infant, or a person who has not given authority for the use of his name, the jobber will remain liable, though the time limited by the rules for objecting has gone by, and though the jobber be unaware of the incapacity of the person named. The effect of this custom is to treat the ultimate buyer or

seller as buying from or selling to the person whose name is given to him on the name day. And this is a reasonable custom, and exempts the jobber from liability in respect of calls or otherwise where he has given the name of a person capable of purchasing.

Let us now give one or two examples of unreasonable customs. It is an unreasonable custom or rule that a broker is only bound to recognise the person actually employing him, and to obey the directions of that person only as to the disposal of the proceeds of a sale of stock. Again, since by a recent statute a contract for the sale of bank shares is void if it does not give either the numbers of the shares or the name of the registered holder, it is both an unreasonable and illegal custom to give and take bought and sold notes of bank shares without such notes containing such particulars. It is not, however, as might be supposed, an unreasonable or illegal

practice to speculate by means of time bargains, and much as the judges have lamented the practice they have not seen their way to declare it illegal. It is no doubt reprehensible, but, so far at least as the broker is concerned, it lacks the essential element of wagering, which is that each party shall win or lose according to the event. The broker can, therefore, in such a case sue his principal for commission and indemnity.

The question whether a custom is binding depends in many cases upon whether the person to be bound was acquainted with it. Some customs are altogether unreasonable and bad. But there are others which, though not bad, are of so peculiar a nature that no one can be held to have submitted to them unless he knew of their existence. And there is the third class, which are so reasonable that every one must be taken to contract with reference to them. It should also be observed that customs do not merely affect

mercantile contracts, but apply to other matters, such as professional, theatrical, and sporting transactions.

It is obviously desirable that the course of mercantile business should be left as free as possible, though it must of necessity be subject to some control. It is when merchants dispute about their own rules that they invoke the law. The courts, therefore, being appealed to are obliged to apply some rule, and the rules which they apply are what are called legal principles, which are almost always the fundamental ethical rules of right and wrong. They decide in favour of that course of business which is in accordance with such principles, and against that course which is inconsistent with them. But when once rules are laid down they must, in the nature of things, become at some time or other irksome to some individual or body of men; and there must from time to time be customs invented which are intended to break through

these rules. Customs of trade are generally invented in order to modify or evade some rule of law applied by the courts to business transactions, and which rule has seemed irksome to merchants. The courts are then again appealed to. And when some such custom is proved to exist, and the binding effect of it is disputed, the question of law seems to be whether it is in accordance with the fundamental principles of right and wrong, whether in fact it does not pass beyond due freedom and degenerate into injustice. If it is not unjust as against persons ignorant of it, it will be upheld, however much it departs from the rules hitherto recognised by the courts as applicable to such transactions; but if it so far breaks from those rules as to be unjust to such persons it is held to be void. When considerable numbers of men carry on a particular business, they are apt to set up customs which operate very much in favour of their side of the business.

And so long as they do not infringe some fundamental principle of right and wrong they may lawfully establish such a custom. But if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule or usage which is so entirely in favour of their side that it is fundamentally unjust to the other side, the courts have always determined that such a custom, if sought to be enforced against a person ignorant of it, is unreasonable, contrary to law, and void.

Such are, in substance, the principles laid down by the House of Lords with regard to trade customs. And they suffice to show, what has already been pointed out, how fallacious is the common notion that the law is ever busying itself with technicalities and subtilties instead of concerning itself with common sense principles. It is a common belief that, whenever the law comes into conflict with custom, the law is in the wrong; but a consideration of the above principles ought to convince us that

such is not the case. Law is, as we have already said, inferior to custom in point of flexibility, but its purpose is far higher. Customs exist for the benefit of a class, or, at best, for the general convenience; but law, though it pays due heed to convenience and expediency, has for its object rather the general right and good than the mere convenience. Without law, custom is always liable to degenerate, not only into injustice, but, as history teaches, into cruel absurdities.

In conclusion let us point out that the public can not only make their own laws in the shape of customs, but can constitute themselves into a court for the purpose of enforcing these customs. As we have seen in the case of the Stock Exchange, customs sometimes take the form of written rules, and when this is the case, there is generally provided a domestic forum in the form of a committee of members to decide disputes and enforce the rules. An inquiry how far the proceedings of such com-

mittees are liable to interference from the law courts may be of some interest, and may further serve to show the principles upon which the public should proceed when acting in a judicial capacity. The principal cases in connection with the subject are those in which the question has been raised as to the power of a club to expel a member. And the law has been thus laid down by the Court of Appeal, that the court will not interfere against the decision of members of a club, unless it can be shown either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been malice in arriving at the decision. In other words, the court will not interfere where the rules are reasonable, and have been strictly observed, unless it be shown that the club has acted maliciously and not in good faith. It is not for the court to say whether what was done was right, or even whether the decision was reasonable. The only question is whether

it was done *bonâ fide*. And the mere fact that the decision was unreasonable is not a sufficient ground for interference, unless it was so manifestly absurd and idle as to show a want of good faith. Thus, where there is a rule that a member shall be expelled if his conduct is injurious to the interests of the club, it is not for the court to say whether his conduct is injurious, and it will not interfere with the decision of the club, even though unreasonable, if it be *bonâ fide*. But though the court will not interfere with the deliberate opinion of the club when fairly formed, it will require to be satisfied that the rules have been strictly observed and the proceedings taken in accordance with the ordinary principles of justice. And so where a member did not question the decision of the club, but objected to the validity of their proceedings, on the ground that no notice of a definite charge was given to him by the committee, that the notice calling the general meeting was insufficient, that the resolution

of the meeting was not properly passed, and the question not properly put by the chairman to the meeting, it was held by the court that every one of these objections was well founded. The public is ever disposed to underrate the value of formalities and to regard them as unimportant, but it is never safe or right to do so; and it is clear that the formalities prescribed by the rules of a club must be rigidly observed in expelling a member. All this is merely common sense. If a man joins a society he joins it subject to its rules, and can only be expelled in accordance with those rules. A club has no inherent power of expulsion, and can therefore only effect this object by means of the machinery provided for the purpose. And it is a natural and common-sense view to hold that the club itself, when it acts fairly and honestly, is the best judge of what is injurious to its own interests. This, indeed, is only another instance of the truth, which the more we study law the more

clearly appears, that wherever we look in the wide field of legal knowledge, the one guiding principle, hidden under detail and obscured by technicalities, is the simple one of pure reason.

# CHAPTER VI.

## BY-LAWS AND RAILWAY PASSENGERS.

"It is very easily said, and nobody questions it, that giving and withholding our assent should be regulated by the evidence which things carry with them; and yet we see men are not the better for this rule. What then shall a novice, an enquirer, a stranger do in this case? I answer, Use his eyes."

LOCKE.

BY-LAWS are somewhat in the nature of customs, inasmuch as they are made, not by the legislature or judges, but by the public or rather public bodies. They also resemble customs in being dependent on their reasonableness and certainty for their validity, and consequently afford another illustration of the way in which law is made and of its first

essential, namely reason or common sense. They differ, however, from customs in this important particular, that whereas a custom is a practice adopted by common consent, a by-law is a rule made by virtue of some power or authority. From the public point of view there is also this further difference, that whereas customs exist for the convenience of those who make them, by-laws may be said to be made for the inconvenience of those who do not make them.

Considered in the abstract, the subject of by-laws is no doubt an arid and uninviting one; but in the concrete it is full of interest, and comes home in a special way to men's business and bosoms. We shall not attempt to define the term, a matter of considerable difficulty; nor need we consider the different authorities by virtue of which a by-law may be made, nor its etymology with reference to its spelling. It will be sufficient for our purpose to take it as meaning a rule made by

virtue of sufficient authority statutory or otherwise, and to say that the weight of authority is in favour of spelling it "by-law" and not "bye-law."

The most interesting part of the subject to the general public is probably that which relates to railway passengers. The question how far a railway passenger is bound by the rules and regulations of the company is one of almost daily occurrence, and, it may be added, of almost daily annoyance. A passenger loses his ticket or his luggage, or becomes otherwise subject to, what generally seem, and what indeed often are, the arbitrary demands of the company. And in most of these cases the validity of the company's by-laws is called in question. The question whether the passenger is in the wrong is in most cases decided by determining whether the by-law which the passenger has infringed is reasonable.

In the first place it must be stated that any person who travels without having paid his

proper fare *and with intent to avoid payment thereof*, is liable to a penalty of 40*s*. This has been provided by an Act of Parliament and is perfectly clear. It is only necessary to point out that a fraudulent intention is the gist of the offence. And if a company proceed under that Act and can prove the fraudulent intention, there can be no doubt about the liability of the passenger. That is common sense; and it will be apparent to every one that if it were not so any person might travel without paying his fare, which is of course absurd.

No one will feel any difficulty in such a case. The difficulty arises where there is in fact no intention to defraud the company—where the passenger loses his ticket, or refuses to show it, or has not time to get one. But how are the company to know in such cases whether the passenger is fraudulent or not? To meet this difficulty most companies have a by-law, either to the effect that any traveller

who is unable to produce his ticket shall be subject to a penalty, or to the effect that he shall pay the fare from the station from which the train originally started. It may be a surprise as well as a relief to the public to know that neither of such by-laws can be enforced. The first is illegal, because it does not make an intention to defraud the gist of the offence, and is therefore in contravention of the Act already mentioned. The second is void, because the penalty is unreasonable, its amount being variable and dependent on the accident of the ticket being demanded at an early or a late stage of the journey.

It is clear therefore that a passenger cannot be made to pay anything beyond his proper fare, unless he intends to defraud the company. And it is clear that the company cannot by a by-law dispense with proof of fraud by providing that every passenger who does not produce a ticket shall be subject to a penalty. It seems also clear that under no conceivable

circumstances could a passenger be made to pay the fare from the starting point unless he travelled from that point. The only remaining point to consider, and this is the crux of the question, is how is the existence or absence of fraud to be proved. Is the company bound to show that the passenger meant to defraud them, or is the passenger bound to show that he had no such intention? The common-sense view would seem to be that the passenger refusing or failing to show his ticket should be bound to prove that he has no fraudulent intention.

The want of a ticket is *primâ facie* evidence of fraud, and entitles the company to put the traveller to proof of the absence of fraud. The refusal to produce a ticket leads in a like manner *primâ facie* to the inference that the traveller has none, and consequently to the inference of fraud. And this seems to be the law. At least it may be said that a by-law to that effect would be good and reasonable.

Such by-laws being, as it is called, in derogation of common right, and being likely to be enforced without much consideration for those against whom they are directed, are construed very strictly against the company. The courts have indeed been astute to discover reasons for not enforcing them, and have at times gone near to being unreasonable in their views of what is unreasonable. Thus it has been held that a by-law requiring a passenger to *deliver up* his ticket "whenever required to do so for any purpose" was wholly void, on the ground that it was unreasonable, since it would enable a company to demand a season ticket back on the first journey made under it, or a journey ticket back before the holder arrived at the station where the tickets are collected. Again, where by a by-law a passenger is bound to show his ticket when "travelling on the railway," it has been held that he is not bound to show it when he has left the

carriage and is passing out of the station, since he is not then "travelling on the railway." The first instance above given is important, as showing the principle by which the reasonableness of a by-law is to be tested. It is not how a by-law *is* applied, but how it *may* be applied, which governs its validity. However little pretence there may be for supposing that the company would exercise the arbitrary power given them by a by-law, and however little disposition they may have shown to apply it otherwise than reasonably, it will, it seems, be void if it in terms authorises the company to act unreasonably, though it be in practice fairly and reasonably applied. It would seem, therefore, to follow that no by-law can be enforced even in a reasonable case, if a case could be imagined in which it could be applied unreasonably. Subjected to such a test there are, it may fairly be said, many laws besides by-laws which would be found unreasonable.

This test, it seems to us, is too severe. It works injustice, for a man may fraudulently travel without a ticket and yet escape conviction under a by-law, simply because the by-law might in some other case be applied unreasonably. The necessity for this is not very clear, and it may reasonably be asked why need the law do more than restrain the unreasonable application of a by-law, leaving it to be applied whenever reasonable. We can only attribute this severity to that very general feeling which regards a railway company as a *caput lupinum*, and entitled to no consideration. Upon the principle that a corporation has no soul, it seems to be thought that a company has no claim to justice.

And this leads us to another part of the subject, namely, passengers' luggage; the law relating to which has been also to some extent influenced by this feeling against railway companies. It seems to be considered, though the opinion is of

course closely veiled, that the mere carelessness of a passenger is a ground for the company's liability. Now, however little we may be inclined to adopt the principle of inviolability of contract in its entirety, we should certainly not consider mere carelessness a ground for departing from the principle. Carelessness and stupidity are sufficiently rife in the world without being encouraged by the law. And we entirely dissent from the covert notion that a company ought to indemnify its passengers against the consequences of their own negligence.

To clear the ground somewhat, it may be broadly stated that the moment a passenger delivers his luggage to a company's porter, the company become responsible for it until the passenger receives it back at the end of the journey; but if the passenger takes his luggage into the carriage with him and loses it through his own negligence, as by leaving it behind him in the carriage, that is his own

look-out, and the company will not be responsible. Into the details of these broad propositions we do not propose to enter, but may proceed to consider the interesting questions which arise when luggage is left in the cloak-room.

These cases do not, strictly speaking, raise any question of by-laws, but rather one of contract. But from a popular point of view they raise the same question, namely, how far the public are bound by the rules and regulations of the company. And they also raise the further general question, how far the public are bound by rules and conditions, of which they are not aware, and with which they do not trouble to make themselves acquainted.

Many of the earlier cases appear to sanction, in, of course, an indirect and guarded manner, the notion, already alluded to, that a company is liable for the passenger's carelessness. But in one of the most recent cases, Lord Bramwell, with characteristic common sense, has placed

the law on a sound footing; and his ruling, it is to be hoped, will be taken as a guide for the future.

The carrying on of a cloak-room is no part of a company's business. The companies open them for the benefit of the public, and they are no doubt a great convenience. Companies cannot be expected to carry them on at a loss, and they might very well do so if they imposed no conditions on the deposit of luggage. For the small sum of twopence they will take charge of and be responsible for luggage up to a certain amount, but it would be unreasonable to expect them for so small a sum to incur liability say for a bag containing £1,000 worth of jewellery. Most companies, therefore, make it a condition that they will not be responsible for any package above the value of £10, and this condition is printed on the ticket, and posted up in the cloak-room. It does not, however, seem to strike the mind of the ordinary passenger that such a condition is reasonable, or that he ought to be in any way affected by it. He

says, in effect: you took charge of my luggage, for which I paid you the munificent sum of twopence; I do not know what your conditions are, nor do I care to inquire; you have lost my property, and you must pay me the full value of it, whether it be five, or five hundred, pounds. This, it seems to us, is not common sense; and we are glad to think it is not law.

The question, however, in such cases, is not whether the condition is reasonable, but whether the passenger had sufficient notice of it. The whole question turns upon whether the passenger knew of the condition. If he knew of it, the company is not liable. But there are cases in which he ought to have known, and ought therefore to be bound. And the law upon the point seems to be as follows: That if the condition is on the back of the ticket or on a separate bill, and there is nothing on the face of the ticket referring to the back or to the bill, the passenger will not be bound by it unless he actually saw it, but if there

was such a reference, such as "see back," "conditions on the other side," or "ticket as per bill," he will be taken to have known it.

The attitude of the public in such matters is that they do not think about them, or, thinking, do not care, and then claim to be indemnified against their own indifference. Why, pertinently asks Lord Bramwell, is there printing on the paper, except that it may be read? What more ought the company to do? Are they to say, "Read that"? But that in effect is just what they do say, by putting into the passenger's hands a paper with printed matter on it, which in all good sense and reason must be supposed to relate to the matter in hand. It is quite true that we must take mankind as we find them, but it would be extending that homely principle to a dangerous extent to allow it to put a direct premium on carelessness.

Common sense, we should have thought, would say that a man ought to know what is

on the back of his ticket, whether his attention be called to it or not, and we believe the courts would have gone to this length with regard to luggage tickets, had it not been for a decision of the House of Lords, which lays down the contrary proposition. But in that case the condition was a stringent one, exempting the company from ordinary liability, and therefore it was naturally held that the condition ought to be distinctly declared and deliberately accepted. The true principle which common sense suggests, which is in harmony with all but expressly enunciated in none of the cases is, that where the condition is stringent or unusual it should be clearly brought to the notice of, and expressly assented to by, the passenger, but when it is natural and reasonable he should be assumed to have known it, if he had the means of doing so. A man may surely be taken to assent to a reasonable condition though unknown to him, though not to an unreasonable one, unless clearly brought to his notice.

This, it seems to us, is the common-sense principle. But the law has not at present gone to this length. It has only declared that a reasonable condition, to which some reference is made on the face of the receipt or ticket, will be binding. But it has not said the same of conditions on the back of the ticket, to which no such reference is made, much less of conditions posted up on a placard to which no reference is made. This principle, as we have said, is likely to be extended in the direction above suggested; but, such as it is, it applies not only to luggage and railway tickets, but also to auctioneers' receipts and other documents of a like nature.

Another point of considerable interest to railway passengers is unpunctuality. This too is governed by the same principle. There seems to be a general impression that if a train is too late to catch another by which the traveller intends to proceed, he is entitled to take a special train and saddle the company

with the cost. This he practically cannot do. We say "practically," because legally he might, if the company did not provide against liability arising from delay, or if they were guilty of wilful misconduct, and if in addition time were of such importance that under the circumstances it was a reasonable thing to do—a combination of circumstances which is extremely unlikely to happen.

It would be probably difficult to find a railway company which did not provide against such liability in their time tables; and therefore, broadly speaking, it may be said that a company is not liable for unpunctuality, unless there is "wilful delay or reckless loitering," which in the present state of railway traffic would be difficult to prove, and is indeed a task almost beyond the reach of private enterprise. In the latest case on the point it was objected that it was unreasonable to require a passenger to search the time bills for conditions, but it was held notwithstanding that a ticket

with "see back" on the face of it, and on the back "issued subject to the company's time bills," was sufficient notice to bind the passenger.

From all which it would appear that the words, "see back," or "please turn over," have been invested with a legal importance which they scarcely deserve; and that the law takes too narrow a view of the question when it seeks to draw a great and vital distinction between the two sides of a ticket. It will, we think, occur to most people that if a person cares to know anything about conditions, he will look at the back of his ticket without being told; and if, like most people, he is indifferent, he will look at neither the face nor the back. "The truth is," as Lord Bramwell sagely observes, "people are content to take these things on trust. They know that there is a form that is always used, and they are satisfied that it is not unreasonable, because people do not usually put unreasonable terms

into their contracts." And therefore they ought to be bound by any reasonable condition, which by their indifference they practically assent to. It is no doubt true that judges will never make people read what is printed on the wrong side of their tickets. You cannot do away with carelessness by legislation. But it is quite another thing to say that people are to have the benefit of their own indifference.

We cannot leave the subject of railway passengers without saying a word or two with regard to the company's liability for injury to life and limb. This liability rests upon quite a different footing from that with regard to luggage. Railway companies, like all common carriers, are responsible for the safe delivery of luggage; but they are not liable for injury to human beings unless they can be proved guilty of negligence. And a valid reason for the distinction is to be found in the inherent difference between a passenger and a portmanteau. A portmanteau cannot

take care of itself, but a passenger can and ought to exercise at least some care. But what amount of care a passenger ought to exercise, or rather what amount of negligence on his part will exempt the company from liability, is a question which has given rise to endless difficulty, and has on several recent occasions been discussed at great length before the House of Lords. This is shortly the great question of contributory negligence—a question which, though giving rise to great technical difficulties, is really a common-sense principle of daily application. If a person contribute to an accident by his own negligence it is reasonable that that should to some extent excuse the company's negligence. And the same principle applies to all cases of negligence. It is a simple question of fact. When people say, "It was his own fault," they unconsciously give utterance to the legal proposition that the defendant is not liable on the ground of the plaintiff's contributory negli-

gence. And here again we are met with the difficulty at the root of all legal questions—the difficulty of defining common qualities by the light of common sense. What is negligence, what is prudence, what is reasonable, are questions which everywhere meet us, and which the law is constantly cccupied in trying to answer.

It would not be surprising to find the definition of negligence somewhat coloured by the popular prejudice against railway companies. And we think there are signs that this is the case. There are not a few instances in which one cannot help thinking the defendants were held liable, not because they were negligent, but because they were a railway company. Pity for the passenger has been indulged in at the cost of the company. And there is some ground for fearing lest the law should recognise a kind of special railway negligence. In the great "pinched thumb" case, where the pas-

senger sought to make the company liable on the ground that his thumb was pinched in the door of the carriage in consequence of the negligence of the company in allowing the carriage to be overcrowded, the House of Lords showed no disposition to encourage this feeling, and decided in favour of the company. But in a later case it seemed to have partially succumbed to the prevailing prejudice; for it practically decided that the omission of a train to whistle when approaching a station is evidence of the company's negligence, and that a person crossing the line is not bound to see if a train is coming. It was also held that where the company put a notice forbidding people to cross the line, and allow it to be continually disregarded, they thereby invite people to do that which they have expressly forbidden. All which, it seems to us, is not strictly in accordance with what common sense, uninfluenced by common prejudice, would have

naturally decided. The real point before the House was the technical one of whether the case was properly left to the jury, and the Lords in effect decided that for them to hold that a jury could not think what they pleased about whistling, would be an invasion of their privileges, and would endanger the constitution. So jealous a watchfulness over the palladium of English liberty cannot be too highly commended; but we think a robust common sense would have thought that juries were made for the public, and not the public for juries, and would have boldly asserted that it was neither the province nor the privilege of a jury to deliver what to most, if not all, of the judges seemed an unjust verdict.

It should also be added that in such cases it is not enough to show that there has been negligence, it must also be shown that the injury resulted from the negligence. It is not enough to show that the negligence was the

remote cause of the accident, but the two must be reasonably connected; for as Lord Bacon says: "It were infinite for the law to consider the causes of causes, and their impulsion one of the other."

## CHAPTER VII.

### THE COURT OF CHANCERY AND THE LAW'S DELAY.

> "Deep on its front engraven
> Deliberation sat, and public care."
>
> MILTON.

FROM time immemorial much misconception has existed in the public mind with regard to the working and jurisdiction of the Court of Chancery. Nor is it surprising, seeing that many a lawyer was as ignorant of the old Chancery procedure as the hapless suitor who suffered by it.

The errors on the subject are contradictory, and on the face of them somewhat absurd. It is often supposed that equity, that is, the justice

administered by the Court of Chancery, is a higher kind of law, indeed little else than morality or natural justice. At the same time, and side by side with this quixotic misconception there exists the notion, though gradually dying out, that the Court of Chancery is a sink of iniquity, into which if you once get you will not be allowed to escape till robbed of your last sou, if not bereft of your senses. The world is full of paradoxes; but there are few more curious than this strange delusion, that justice so pure could flow through channels so corrupt and tortuous.

The court in question has been the subject of much undeserved obloquy. No institution, or none at least not wilfully corrupt, has ever met with the denunciation which Dickens, in unmeasured language, poured upon the Court of Chancery. What institution, even in fiction, has ever been described in terms approaching to these? "That most pestilent of hoary sinners, with its pretence of equity and its

mountains of costly nonsense, that has its decaying houses and blighted lands in every shire, that has its lunatic in every madhouse and its dead in every churchyard, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, Suffer any wrong that can be done you rather than come here."

The denunciation is so eloquent and picturesque that one is naturally inclined to attribute it to an overheated imagination, or to a deliberate design on the part of the author to overdraw the picture for the sake of effect. But Dickens has denied that such was the case, and has solemnly asseverated that all he said was true. Every one, however, who has had any experience of the old Court, will know the picture to be so purely imaginative that he can afford to be grateful to Dickens for investing it with a picturesqueness which it would

not have otherwise possessed. But on the other hand it was not, and could never have been, true to say that it was immaculate, a term applied to it even in those days by one of its judges, and which to Dickens seemed so preposterously absurd as to be only applied by a person bereft of his senses. But what the judge in question probably meant, and what was more or less true, was that defective though its machinery might be, it did honestly and diligently strive to see that right was done; and slow and costly though its proceedings sometimes were, it did ultimately succeed in administering justice to all who came to seek it at its hands. Had there been a particle of truth in what Dickens wrote, the whole institution would have been long ago swept away, bag and baggage, by an indignant public.

We do not pretend therefore that the Court was perfect. No institution can ever be so, even when it starts with a well-considered scheme. Time alone can bring out its defects

and show the true remedy for them. With whatever foresight an institution may be planned, it must sooner or later get out of harmony with the times and require adjusting to the exigencies of the age. And from this common destiny the Court of Chancery was certainly not exempt. It started with the best possible intentions, and was at all times a most well-meaning institution; but it would be idle to deny that it did at times fall behind the age and become unequal to the functions it was called upon to discharge.

The origin and object of the Court may be explained in a few words. The Common Law Courts in very early times began to fail in giving complete justice. The reason was this. According to the common law every kind of civil wrong was supposed to fall within some particular class, for which an appropriate writ existed. Thus, if a man had suffered a wrong he could not simply bring the facts of the case before the court and leave it to the

court to say whether the case was one deserving redress, but he had first to determine within what class of wrong his case fell, and then apply for the appropriate writ. The consequence was that a man often failed to get justice, either because his wrong did not fall within any of the classes of wrongs which the common law recognised, or because he mistook the class of wrong within which his case fell, and brought the wrong form of action. A man, therefore, might prove facts showing that he was entitled to redress, and yet get no remedy. The Common Law Courts thus falling short in the administration of justice, those who suffered wrong, for which they could get no redress in the Common Law Courts, applied to the King, who referred the matter to the Lord Chancellor. Thence grew up a practice of applying to the Chancellor direct, who, instead of attempting to frame new writs to meet the justice of every case, took upon himself to apply a remedy

to each case as it came before him by ordering the defendant to do, and compelling him to do, what he considered right in equity and in conscience.

Such, as far as is possible to give it in a few words, was the origin of the Court of Chancery and of Equity Jurisprudence.

As time wore on and the number of applications to the Chancellor increased, the power to hear such applications was, to meet the growing wants of society, granted to other judges—first to the Master of the Rolls, then to the Vice-Chancellor of England, then to two other Vice-Chancellors, and finally to all judges of the High Court. But notwithstanding the nominal fusion of law and equity, the great bulk of the Chancery business is still disposed of by the Chancery division of the High Court, which now represents the old Court of Chancery, and the judges of that division have still the exclusive power to try certain actions of a purely equitable nature.

The reader will have noticed, in the foregoing sketch of the origin of equity, that the Lord Chancellor seems to have administered a kind of natural justice in a somewhat personal and arbitrary manner, just as an arbitrator, unfettered by principles or precedents, decides a case purely on what he considers its merits. Now it is clear that, if law is to have any stability or certainty—which is the first essential of all law—this mode of administering justice could not long continue. Owing to the fallibility of human judgment, and the different views which different minds take of the same facts, there would soon have arisen a fatal inconsistency in the decisions of successive Lord Chancellors, had not each case been decided with reference to previous decisions. We can well imagine that each succeeding case as time went on came to be decided less and less as a case of first impression, and more and more with reference to the cases that had gone before. Hence

there sprang up a system of equity jurisprudence, which is practically natural justice restricted within comparatively narrow limits by judicial decisions.

It will be seen, therefore, that equity is not, and could not—so long as it is administered by human hands—be synonymous with abstract justice or morality. It was designed to mitigate the rigour of the common law, and supply its defects; but it has—as every system of human law must have—certain definite principles which are more or less binding, and previous decisions which it is bound to follow.

The maxim that there is no wrong without a remedy lies at the very root of equity jurisprudence, but it is true only in a very limited sense, even in equity. It is not enough to show that you have suffered a wrong in order to get a remedy. You must show that the wrong you have suffered falls within some recognised principle or reported

case before the Court will grant you relief. There are many wrongs, we need hardly remind the reader, for which he can only seek relief at the bar of public opinion, or hope for complete redress in another world.

Having given a rough outline of the origin and nature of equity, let us refer very briefly to one or two of the principal kinds of actions which are disposed of in Chancery.

The chief difference between an Equity Court and a Common Law Court has always been, and still is to a great extent, the different kinds of relief which they respectively give. Every one knows that an action at law results in money damages. Roughly speaking, the only remedy known to the Common Law Courts was pecuniary compensation; and though they are now empowered to give equitable relief, they still in the large majority of actions grant simply damages. Now the aim of the Chancery Courts has always been, not simply to award damages as compensation for a wrong, but

as far as possible to make the defaulter undo the wrong and do what is right. The means by which the Chancery Courts effected this object was by decrees for specific performance, injunctions, and orders containing all sorts of accounts, inquiries, and directions which practically wound up and settled the most complicated cases and all matters in dispute between the parties. In the case of a breach of contract for instance, the Common Law Courts could only award damages for the breach; but the Chancery Courts would make an order for specific performance, that is an order for compelling the defendant to perform the contract. In the case also of a threatened injury, the Common Law Courts could only award damages for the wrong when done; but in equity one could get an injunction restraining a person from committing the threatened injury. And the advantage of the relief in equity is clear, for cases will readily occur to every one which do not admit of pecuniary compensation,

or in which such compensation would be very inadequate redress.

These are simple cases, and the relief obtained is prompt and easy. They are like Common Law actions in which there is one single issue to be tried between two persons, the plaintiff and defendant. But there are others which are extremely complicated, which raise numerous questions between numerous parties; and in actions of this sort no Common Law Court could pretend to give relief. In these, however, the Court of Chancery institutes inquiries, takes accounts and gives directions, and finally settles all matters in dispute, not only between the plaintiff and defendant, but between all parties interested in the subject matter of the action. It is clear that such actions must take time and cost money, especially as talent of a very high order is employed in conducting them; but the time and money expended are not due to any fault on the part of the Court or its practitioners,

but to the complicated nature of the cases with which they have to deal.

One of the largest and most important branches of equity is that relating to trusts; and here again we see the salutary operation of the Chancery jurisdiction. In olden times, trusts were not recognised at Common Law. So that if property were given to one man to the use of or upon trust for another, the Common Law Courts ignored the trust and treated the first-mentioned person as the owner. Most of the land, however, in early times was held in this manner, partly because it could, when so held, be disposed of by will, and partly because the owner thus escaped the oppressive incidents of feudal tenure. There were, however, considerable inconveniences attending this mode of holding land, one of which was the uncertainty of ownership it entailed. And the legislature consequently made repeated attempts to abolish the practice, which were, however, always suc-

cessfully frustrated by the Court of Chancery. The result is, that though all objections to the practice have long since been removed, trusts, with all their obvious advantages, still exist, and are now recognised by courts of law.

This is only one of many instances in which the courts have controlled the legislature. And it may here be useful to state, what is often lost sight of, that the bulk of the law of this country is made, not by the legislature, but by the law courts; and not only do they continually make fresh law, but they control, extend, amend, and interpret that made by the legislature. And if we may say so, there is no duty which the courts are called upon to discharge more arduous and difficult than that of interpreting and attaching a plain meaning to the language in which Parliament in its great wisdom expresses its decrees.

There are several other important branches of equity jurisprudence which we can do little

more than enumerate, namely: the jurisdiction in cases of fraud, mistake, and accident, in which the Court of Chancery has given relief where no remedy could be obtained at Common Law; the jurisdiction over mortgages, in dealing with which the Court has always been careful to see that the borrower has not been taken advantage of by reason of his necessitous condition; the jurisdiction over infants, married women, and lunatics, whose property the Court has ever jealously guarded against those ready to take advantage of their unprotected condition or incapacity to manage their own affairs.

Such are some of the high functions that the Court of Chancery has from its earliest infancy been called upon to discharge, and which, it is not too much to say, its successor still discharges with great ability and discretion.

Before parting with the subject let us briefly allude to a fact the ignorance of which has led to most of the misconception and prejudice which the public have entertained with regard

to Chancery proceedings. It is a popular notion that the Court of Chancery is purely concerned with litigation. Nothing, however, is farther from the fact. A large, perhaps the larger, portion of the business of the Court is purely administrative. The Court exists, not merely to decide disputes, but to administer estates, to execute trusts, to wind up companies, to take accounts and work out inquiries, to act as trustees and guardians, and transact a host of other business of a non-litigious character. This being the case, it is clear that much of the Chancery business must take time. A simple dispute between two persons may be quickly disposed of; but a large estate or company cannot, it is evident, be wound up all in a moment.

Take, for instance, a simple case where a man dies intestate. An action for administration is brought, his property is realised, his creditors paid, and the residue of the estate distributed under the direction of the Court.

Even in such a case, where the Court acts merely as trustee, a considerable time must necessarily elapse before the matter can be finally disposed of.

But in more complicated cases an action must, in the nature of things, take years before it can come to an end. Take the case of an action for administration of an estate which the testator has bequeathed to his children for their lives, and after their deaths to their children when they attain twenty-one. Here the action may last as long as the trust lasts, that is, until the children's children attain twenty-one, which might be fifty years, or even longer. To say that an action has lasted, or can last, for fifty years is apparently to condemn the system under which such a state of things is possible; but the statement in that form is altogether misleading. To put it in another way, the action lasts as long as the Court acts as trustee of the estate. The Court does not withhold

justice for fifty years, as the first statement seems to imply, but simply takes care of the property until some one is absolutely entitled to it, paying in the meantime the income to those to whom it belongs. Such actions are often represented as owing their vitality, not to the happy health of the tenant for life, which is the true cause, but to the careless indolence or perverse ingenuity of the Court and its practitioners. But such a misapprehension, it is clear, could not exist were the true nature of Chancery business better understood.

There is, in fact, no such thing in Chancery as the "slipshod suitor," whom Dickens holds up for our commiseration; and if there were, he would be deserving of little sympathy. It is a common weakness of human nature to believe that it has not received its due; and there are few families that do not cherish a tradition that they would be rich and pros-

perous had it not been for some unlucky failure of justice which deprived them of their rightful possessions. Labouring under such a delusion a man will sometimes waste time and money in trying to make good his imaginary claim; but it can only result in failure, and the failure is due to his own fatuity. A grievance, it is to be remembered, must be real and not imaginary, a claim must be proved and not merely made, before the Court has any voice in the matter. It is the desire as well as the duty of the Court to do justice; but it would be doing something more, or rather something less, than justice did it sit to encourage delusions, and give away property for the mere asking.

One word more. It is possible, even in these days, that there may be some avoidable delay, or, as Lord Bacon puts it, "somewhat of the cunctative," about Chancery proceedings. But it must be remembered that briefest judgment is not always the best,

though we are sometimes told that a litigant would rather have a speedy judgment against him than a tardy judgment for him. If, however, there is even now any avoidable delay, the remedy is to a great extent in the public's own hands. If the work gets in arrear it is mainly because the staff of officials is insufficient for the work it has to do; and if the number of officials were increased the work would be greatly accelerated, and there would be little or no delay. But this must be done, if at all, by the public; for no Government is likely to sanction the increase of expenditure which this step involves unless forced to it by public opinion.

## CHAPTER VIII.

### THE WHOLE DUTY OF A TRUSTEE.

"Let every eye negotiate for itself,
And trust no agents."

SHAKESPEARE.

To give in detail the whole duty of a trustee would require volumes; but, roughly speaking, it lies in a nutshell. It goes without saying that a trustee is bound to perform his trust as defined by the deed or will creating it, and is limited to the powers conferred upon him by the same instrument. If he fail to perform the trust, or exceed his powers, and loss is occasioned, he is of course responsible, and must make good the loss. All that is clear to even the meanest capacity. And we need

not insult the reader's intelligence by telling him that if a trustee is guilty of gross negligence, or does something which is clearly unauthorised by the trust, he will be personally responsible for the consequences. Here, as elsewhere, we shall not hesitate to assume that the reader is gifted with ordinary intelligence.

The sins of trustees are grievously punished; indeed, there are few more heavily penalised. The ordinary notion of a punishment is an adequate pain or penalty proportioned to the offence committed, but the penalty inflicted on a trustee is in no way proportioned to the grievousness of his fault. A trustee who commits a breach of trust is liable for all the loss occasioned, however slight the fault, however great the loss. And it not unfrequently happens that the most venial fault entails the heaviest loss, and therefore the heaviest punishment. This is important to remember; for it is to forgetfulness of the fact that are due most of the breaches of trust which trustees

unwittingly commit. If the reader asks why this should be so, we can only answer that this severity of punishment is absolutely necessary, if trusts are to continue and trust estates to be protected.

In dealing with the duties of trustees it will only be necessary to consider breaches of trust. And in considering what is a breach of trust we may confine our attention to those cases in which loss arises through no direct default of the trustee; for the reader will hardly require proof of the statement that the trustee is liable where the loss flows directly from his default. This, however, we can only do in a general way; and it is not of course intended in these pages to supply the trustee with a complete guide to his duties, but merely to put him on his guard, and so help him to avoid risk and danger.

There are many cases, then, in which a trustee is liable, though he had no intention of committing a breach of trust, and though

the loss flows, not directly and necessarily, but indirectly and perhaps accidentally, from the omission of some strictly legal duty. Thus, if a trustee, though from prudent motives, omit to sell property when it ought to be sold, and it afterwards goes down in value through some unforeseen circumstance, he will be liable; for the loss, though not directly caused by his default, would never have happened had he not failed in performing what was a strictly legal, though not an urgent or important duty.

It may, therefore, be broadly stated that where a trustee omits to perform a strict legal duty, and loss, whether direct or indirect, ensues, he will be liable. There is nothing in that proposition to startle the reader, who will probably think it not very novel, and no doubt it is not; but the difficulty is to say what is a legal duty. To put the statement in another and more popular form, we may say that a trustee is liable when the loss is occa-

sioned by his own fault. That, of course, is a truism, and mere common sense. But it shows the defects, or rather inadequacy, of common sense, which is an excellent makeshift for special knowledge, where the latter is not available, and a really useful guide in simple cases. But it rarely goes far enough, and is not sufficiently explicit to solve difficulties, or afford much help in complicated cases. So when we say that a trustee must bear the loss occasioned by his own fault, we want to know what is a fault in the sense of a legal fault, and that, in a case of any difficulty, ordinary common sense is unable to tell us. It may, however be safely said that where there is a fault in the ordinary sense, there is also a liability; and we leave it to the common sense of the reader to determine when such a fault has been committed. The difficulty arises where the trustee is liable though he has done nothing which, in the ordinary sense of the word, can be called a fault. There are many cases where he is heavily mulcted, though

there is nothing to be said against his honour or *bona fides,* or even his conduct; and where his sole fault (a legal and technical one) is that he has placed too much confidence in another.

By far the greater portion of a trustee's duties are done by or through a solicitor; and with these the general reader has nothing to do. It is when he acts for himself, or through others than his solicitor, that he chiefly requires guidance; and these are the cases we shall principally consider. But before doing so, let us strongly impress upon the minds of all trustees the fact that, though they may leave many things to their solicitors, there is one thing they must not do. A judge has recently protested in the strongest possible manner against trustees allowing their solicitors to receive trust moneys. It is no part of the business or duty of a solicitor to receive such moneys; and it is of the utmost importance that trustees should understand that they are just as much liable for the loss of trust moneys which they allow to get into their

solicitor's hands as if they put them into their own pockets. This is a plain and invariable rule, and one which cannot be infringed without risk. It is a lesson which seems to require constant reiteration; and being systematically disregarded it cannot be too often repeated.

It is a breach of trust to employ a person to do anything outside his employment, and it is outside the scope of a solicitor's employment to invest trust money. Let us see how this applies to others than solicitors. These are the most important of all cases of breach of trust, since they define the limits of liability, they give rise to most difficulty and excite most interest. These cases are of course very numerous. They begin with an important case decided by Lord Hardwicke in 1754, and end with an equally important decision of the House of Lords in 1883. In many of the intermediate cases the Courts had required extreme circumspection and vigilance on the

part of trustees; but in the first and last it was practically decided that all that is required is that they shall use such customary care and diligence as is exercised by men of ordinary prudence in the management of their own affairs.

This last case may be said to sum up in a general way the whole duty of a trustee, and is important as being a decision of the highest authority, and as offering a distinct check to the tendency of the courts to extend the liability of trustees.

The facts of the case are these. A trustee, at the request of the persons entitled to the fund, employed a stockbroker to invest £15,000 of the trust funds in corporation stock. On the day before the next settling day the broker brought to the trustee a bought-note, and received from the trustee the £15,000 on the statement that the money would have to be paid the next day. There was evidence to show that the bought-note would indicate to stockbrokers,

though probably not to other people, that the securities were to be procured direct from the corporation. About a month after the payment of the £15,000 to the broker he became bankrupt, and it was then discovered that he had never acquired the securities, but had appropriated the money to his own use.

The money was therefore lost, and the question arose whether the trustee was liable. What the common sense of the general public would say upon the point it would, perhaps, be rash for a lawyer to conjecture; but we think it likely that the common sense of trustees would say No, and the common sense of beneficiaries, who had lost their money, would say Yes.

It will be observed that this is one of those cases in which the loss does not arise through the failure of the trustee to observe the strict terms of the trust. The will directed him to invest the money, but it did not (as no will ever does) prescribe the precise mode of invest-

ment, or the degree of caution to be exercised. He was bound to invest the money, and he invested it in the ordinary way. He might have exercised more caution; but was he bound to be suspicious? The law on the point was clear; he was bound to invest the money as a prudent man of business would invest his own. But what is a prudent man of business? Here, if anywhere, common sense ought to help us. The law has never ventured upon a general definition of the term; but it is just one of those questions which common sense might be expected to answer. The question, however, is not an easy one even for common sense; for opinions must necessarily differ on the subject. What you might consider ordinary prudence, we might consider extraordinary imprudence; or perhaps *vice versâ*. Some people's prudence, in short, is other people's folly.

The question, however, had to be decided; and it came on for decision in the first instance before Vice-Chancellor Bacon, who practically

delivered judgment by asking a question. Can it, he asked, referring to the bought-note, be said that any prudent man would have parted with £15,000 on that scrap of paper? And the answer to the question, put in that form, was, of course, "Certainly not." The trustee was consequently held liable, and ordered to repay the £15,000 with interest and costs.

The trustee being morally blameless, and indeed having left the Vice-Chancellor's Court without the slightest reflection on his integrity, naturally appealed. The appeal was heard, and in the result the decision of the Vice-Chancellor was reversed, and the trustee declared free from liability; the grounds of the decision being that the trustee was justified in employing the broker whom he had no reason to suspect, and that the bought-note was a document upon which any ordinary person might have been expected to hand over the money.

The case was taken to the House of Lords, where it was again held that the trustee was not

liable, and where it was laid down that a trustee is justified in paying money to a broker whenever there is a moral necessity or sufficient practical reason for his so doing. And as an illustration of what is a moral necessity, it may be said that if the trustee had known that the bonds were to be procured direct from the corporation, the money could have been paid direct to the corporation, and there would have been no necessity for paying it to the broker. But on the other hand, however usual it may be to deposit money with a broker until an investment is found, that is in effect lending it to the broker on his own personal security, for which there is no moral necessity, and is therefore a breach of trust. Wherever, it would seem, there is no difficulty in passing the money direct from the lender to the borrower, or from the buyer to the seller, it is the duty of the trustee, though he employ an agent, to pay the money by crossed cheque made payable to the borrower or seller. And it may be well to add,

what has been suggested by Lord Blackburn, that confidence in brokers may possibly be shaken, and it may become unusual to pay money to them as in this case; and if the usage change, a trustee who pays money in this way after it has ceased to be usual, may be responsible.

It comes then to this, that a trustee must rigidly adhere to the terms of his trust as far as they are expressed or incorporated in the instrument creating the trust; but if he does anything outside the terms of his trust, he is only bound to act as a prudent man of business would have acted in a similar case. He may employ solicitors, brokers, agents, and others where there is a sufficient practical reason for employing them; and he will not be liable in case of their default, always of course assuming that he had no reason to suspect them of dishonesty or insolvency. That it seems to us is the whole duty of a trustee. And it is one which common sense, rather than a knowledge of law, will best enable him to discharge.

The law, in the above case, has probably gone as far as it well can in its lenience towards trustees. And it is quite possible that it will be found necessary to restrict the application, or at least the inferences, of that decision. It is easy to see that any laxity on the part of trustees might open the door to fraud, and lead to serious mischief. And that the above case does sanction a certain amount of laxity is evident, as is also the danger of so doing. On the other hand, if the law is too strict against trustees, it may, as Lord Hardwicke said, "strike a terror into mankind," and prevent any one from accepting the unthankful office, besides causing a hindrance to business. It seems common sense to say that a trustee shall not be required to use more than ordinary prudence; but if this is to mean that he is only to use such prudence as is usually exhibited by ordinary people, it may well be thought to say too much; for ordinary people, in the opinion of many, habitually exercise too little. We do

not say that the above case goes to this length; but it is a possible inference, and one which trustees will do well to guard against.

It will be seen, therefore, that the above case does not clear the trustee's path altogether from difficulty, and make everything smooth; but it does show, what the reader is mainly concerned to know, how very slight a thing may cause him heavy loss, if not utter ruin. Had the bought-note, in the above case, shown on the face of it that the stock was intended to be procured direct from the corporation, it is probable that the trustee would have been held liable. On so slight a circumstance, therefore, hung the fate of £15,000!

And here let us parenthetically point out, what this case illustrates, namely, the difficulty of applying the law to any given facts, even when the law is certain and the facts clear. The difficulty of administering justice is threefold: to know the law, to grasp the facts, and to apply the law to the facts; and perhaps

the second is the most difficult of the three, though it may not appear so. The public rarely realise these difficulties; and consequently it often happens that they constitute themselves an irresponsible court of appeal, and adjudicate in a hasty and perfunctory manner upon cases of great difficulty, to the prejudice of justice and its administrators.

Law being the handmaid of Justice naturally shares her cold and calm demeanour, and therefore rarely if ever allows a man to indulge his feelings, however virtuous they may be. A breach of trust is in most cases the result of carelessness; but there are not a few cases in which it is caused by tenderness of heart or good-natured compliance with the wishes of others. Meritorious motives, however, as perhaps the reader is beginning to find out, have little to do with legal liability, and are generally no excuse; for just as conscientious stupidity commits the worst of blunders, so meritorious motives often lead to the most mischievous

consequences. A trustee, therefore, who commits a breach of trust is not protected by the circumstance that he acted from the best of motives, or that he took and honestly followed the advice of his solicitor, nor even that he committed it with the object of saving his beneficiary from ruin. Thus, where a married woman by her entreaties persuaded her trustee to commit a breach of trust to save her husband and family from ruin, she shortly afterwards made the trustee liable for the breach of trust, by bringing a Chancery suit against him! This may seem very unjust, and no doubt it was hard upon the trustee, and base ingratitude on the part of the wife; but it would be easy to show that the decision was not only right but was absolutely necessary for the maintenance of the law and the protection of married women generally. There would of course be even less excuse for a trustee's refraining, through motives of tenderness, from enforcing payment of a debt due to the trust estate, or on the other

hand acquainting a third person with a possible claim which the trustee honestly believed the former had to the trust estate. A trustee has the custody of the trust property, but he has not the custody of the consciences of those to whom it belongs.

It is the wise policy of the law to treat persons in certain positions as though they were children. A trustee, therefore, is prohibited from doing any act which might place him in a situation of temptation. Hence, he should in all cases keep the trust money separate from his own, for if he mixes it with his own in a common account he will be deemed to have treated the whole as his own, and be charged with interest, and be liable for any loss sustained by the banker's insolvency.

Upon the same principle a trustee is never permitted to make a profit out of his office or the trust property, and if any such profit is made it belongs to the trust fund. Thus he will be accountable for all interest and gains,

beyond what a proper investment of the trust fund would have produced, which he has actually made, whether in the ordinary discharge of his duty or in transactions entered into on his own account. And for the same reason a trustee will not be allowed to purchase the trust property, even at a public auction, unless the persons selling intended that he should buy, and there is no fraud, concealment, or advantage taken by the trustee.

Again, he must not expose his co-trustee to temptation, or give him the power to commit a breach of trust, for it is the duty of each to see that the whole property is rightly applied and safely secured. He is responsible not only for his own acts and defaults, but also for those of his co-trustee, in which, though without wrong motive, he expressly, tacitly, or virtually acquiesces, or which would not have happened had he strictly observed his trust. Thus he will be responsible if he allow

the trust money to remain for any length of time in the hands of his co-trustee. And if two trustees agree that one shall have the exclusive management of one part of the trust property and the other trustee of the other part, each will be liable for any loss which may happen even to the part of which the other has the management. "A trustee may not share his responsibility or delegate his trust, though, as we have seen, he may in a proper case act by proxy. But where he has resolved in his own mind in what manner to exercise his discretion, he cannot be said to delegate the confidence if he merely act through another or signify his will by proxy.

And here it may be well to mention that the usual indemnity clause, to be found in most wills and settlements, and which provides that one trustee shall not be answerable for the acts and defaults of his co-trustee, is practically worthless. It merely states what the law implies, and does not exonerate the trustee from

liability. Its insertion, however, leads many, in ignorance of this, to accept a trust, and many others to be so remiss as to give their co-trustees the opportunity of committing breaches of trust, whereby loss and litigation is occasioned.

The principal duties and defaults of trustees being connected with investment, we must briefly refer to the investments authorised by law. Almost every will and settlement contains a clause which enumerates the securities in which the trustee may invest the trust fund, and he is bound to invest accordingly. But where this is not the case, he may invest in any of the securities authorised by law. Unless, therefore, expressly forbidden by the instrument creating the trust, he is allowed by law to invest the trust fund in any of the Parliamentary stocks or public funds, or in any security the interest of which is guaranteed by Act of Parliament or stock of the Bank of England or Ireland, or in East India Stock charged on

the revenues of India, or in Metropolitan Consolidated Stock, or on real securities in any part of the United Kingdom.

And where trustees are authorised by the trust instrument to invest in the bonds or debentures of railway companies, they may invest in the debenture stock of such companies, or in nominal debentures or nominal debenture stock issued by local authorities under the Local Loans Act, 1875.

In lending money on mortgage, trustees should be careful to satisfy themselves as to the sufficiency of the security. And, as a general rule, they should not advance more than two-thirds of the value of agricultural freeholds, or one-half of the value of freehold houses, or even less if the value depend upon fortuitous circumstances.

It may be necessary to warn trustees that where they invest on mortgage they should see that this is properly done, for it is not sufficient to hand over the money to their

solicitor for investment. A trustee may, as we have seen, hand over the money to a broker for investment, or allow it to remain for a reasonable time in the bank pending investment, without incurring liability. But since the investment of money is not within the scope of a solicitor's employment, the trustee will be liable if the solicitor misappropriates money so placed in his hands.

And here our brief notice of the subject must end. On a subject so vast, much must necessarily remain unsaid; but we have said enough to show how beset with difficulties and dangers is this unthankful office; and if but one trustee is in consequence prevented from unwittingly committing a breach of trust, these pages, however inadequate, will not have been written in vain.

## CHAPTER IX.

### WILLS AND THEIR PITFALLS.

*"Verbis aliud prodit quam mente volutat."*

THERE is nothing easier than to make a will. There is also nothing more difficult. In a simple case one has merely to write down one's intentions and sign them in the presence of two witnesses. But to draw a complicated will, which shall give rise to no question, is a task which of all others taxes the skill and experience of the lawyer.

To express one's intentions seems a simple matter, and is generally supposed to be within the competence of every ordinary person. But the notion is a fallacy, as half the mistakes

and troubles of the world testify. To say that a man says what he does not mean, or means what he does not say, is to imply that he is either a fool or a rogue. Yet to say what we mean is a difficulty which we all feel, or at least suffer from. There are no doubt certain stereotyped phrases having a fixed meaning, which no one can mistake; but the moment we travel outside these we are liable to error. To impart clearly even what we know clearly is a difficult matter; and to be properly understood it is also necessary, not only to know what we mean and say it, but to have some idea of the effect which the words will have upon the mind of the hearer. It is quite possible to express one's meaning with accuracy, and yet convey a wrong impression. There are many Mrs. Malaprops in the world; and few people do not, in a greater or less degree, use words in a wrong sense, or in one slightly different from the true one. The old story about the Billingsgate fishwoman and the parallelo-

gram is only an extreme instance of the force which expressions derive from the ignorance of the hearer. And the converse is also true; a greatly superior intelligence on the part of the hearer being almost equally fatal to a proper understanding. No two minds, the late Sir George Jessel was fond of saying, will necessarily put the same construction upon the same apparently simple words; and even when the words are clear and precise, there may still be a latent ambiguity, owing to the circumstances, or change of circumstances, with reference to which they have to be construed.

This difficulty of expressing a plain meaning is encountered in the preparation of all legal documents, but it is especially met with in the drafting of wills, which are both less formal and more liable to be affected by future events than other documents. The moral of all this is that it is very unwise to make your own will unless you wish your

property to be thrown into Chancery. The man who does so is likely to benefit the lawyers by giving rise to litigation; and the praises of so good a friend to the profession have been sung by Lord Neaves in some verses in which the following sound advice is given to all intending testators:

"You had better pay toll when you take to the road,
Than attempt by a by-way to reach your abode;
You had better employ a conveyancer's hand,
Than encounter the risk that your will shouldn't stand.
From the broad beaten track when the traveller strays,
He may land in a bog or be lost in a maze;
And the law when defied will avenge itself still
On the man and the woman who make their own will."

This is sound advice, which no one, not even a Lord Chancellor, can safely disregard. The people who make their own wills are generally those who have no idea of the difficulties of the undertaking, and such people would probably have desisted from the attempt had they been aware of those difficulties. In giving, therefore, some account of the nature of those

difficulties we may reasonably expect to deter rather than encourage the practice in question.

And in the first place it may be well to state that a man may leave his property to whom he pleases; though a common phrase with which we are all familiar seems to point to a popular notion that he cannot wholly disregard the claims of his son and heir. The popular way of expressing the fact that a man has been disinherited is by saying that he has been cut off with a shilling. But there is no legal obligation to leave a son or heir anything, not even a shilling, in which humble coin the law recognises no special virtue for disinheriting purposes. To cut a man off with a shilling would therefore be a reprehensible proceeding, for it would be a gratuitous insult and an insulting gratuity, it being a bequest wholly unnecessary and menial in its smallness. We are not, however, aware that such a bequest is ever made, at least we never saw one. The expression, however, is constantly used, and

though its origin is lost in antiquity it seems to point to the notion that a man cannot pass his son or heir over altogether in silence. This, as we have seen, is a fallacy. A man may leave his property to the Mahdi or the Claimant, or any other person having just as little claim upon his bounty, though such a bequest might possibly be evidence of the testator's insanity, and therefore a ground for upsetting the will.

This right of every man to leave his property to whomsoever he pleases has long been the recognised right of every testator. And if a son is unjustifiably excluded from his father's will he has no redress; for there is nothing in English law resembling the Roman Querela Inofficiosi Testamenti (the plaint of an unduteous will), by which a son so excluded could be reinstated in the family inheritance.

This right of free disposition has not, however, always existed. Formerly a man who left a wife *or* children could only dispose by

will of one-half of his personal property, and if he left both a wife *and* children he could only dispose of one-third. This fact, however, does not afford a sufficient explanation of the origin of the fallacy above mentioned.

The right, as regards both land and personal property, has been of very gradual and almost imperceptible growth, and has in each case a distinct and separate history. But though it is now coextensive as regards both, there is still considerable difference between a will of lands and a will of personalty. A will of lands, for instance, does not in strictness require to be proved, and the lands at once pass to the devisee; but a will of personal property must always be proved, and a legatee can only obtain his legacy through the executor, who is the recognised legal owner of all the personal property bequeathed. In practice, however, all wills are proved, since the probate conclusively establishes that the will was executed according to law.

And here may be noticed, what is a curious historical fact, that the law has in many respects assumed its present form in consequence of the delinquencies of the Church. Many important alterations could be mentioned which were effected solely with the object of checking the grasping propensities of the clergy. And though the Church has long since mended its ways, and no longer desires or has the power to misappropriate people's property to "pious uses," yet there still remain many of these safeguards, more or less intact, though the original need for them has been forgotten. One of these safeguards is the Court of Probate, and another is the Law of Mortmain.

Acting on the not unnatural, but as it turned out wholly erroneous assumption, that "spiritual men are of better conscience than laymen," the State had, in very early times, entrusted the distribution of intestates' estates to the ecclesiastical authorities. And as they

thus had the administration of the effects of intestates, it was but natural that the will of a deceased person should be proved to the satisfaction of those, whose right of distributing his chattels for the good of his soul was thereby effectually superseded. Hence originated the probate of wills. But these reverend prelates, not being accountable to any but to God and their consciences, devoted the property so coming to their hands to uses which the mistaken zeal of the times denominated "pious," but which were very far from just. They, in fact, appropriated the goods to their own use, or to, what was much the same thing, the use of their Church, without paying even the lawful debts of the deceased. This abuse became eventually so great, that the jurisdiction, which for eight centuries had been enjoyed by the Church over wills and intestacies, was at length withdrawn, and transferred to the Court of Probate, now the Probate Division of the High Court. The

result is that estates are now distributed not only with due regard to the claims of creditors, but also to those of the next of kin. And even where there are no next of kin, it is not the Church but the Crown which now takes the residue of the property after satisfying the claims of creditors.

Another instance of a law which owes its existence to the cupidity of the Church is that which forbids a man to leave his land by will to charities. This rule is generally, though not with much propriety, called the Law of Mortmain. We shall presently see how much modern wills have been affected by this rule, but we must first briefly explain the origin of the rule.

From the earliest times, religious houses, such as abbeys and priories, evinced an inordinate desire for the acquisition of land, and found, moreover, the means to indulge the craving. But since the acquisition of land by these houses meant the loss of the services

for the defence of the realm, and also prevented the circulation of landed property, it was early found necessary to control their cupidity. The struggle that thereupon ensued between the Law and the Church affords an interesting study of human ingenuity. It is indeed curious to observe, as Blackstone remarks, the great address and subtle contrivance of the ecclesiastics in eluding the laws, and the zeal with which successive parliaments pursued them through all their finesses, how new remedies were still the parents of new evasions, until the legislature at last, though with difficulty, obtained a decisive victory.

Being as far back as the reign of Henry III. prohibited from taking land, the clergy soon found a means of evading the prohibition by taking long leases for a thousand years, which practically amounted to the same thing as taking the land; and thus originated the long terms which were at one time found so useful in conveyancing. To prevent this evasion an

Act was passed in the reign of Edward I., which provided that no one should "by any art or ingenuity" appropriate to himself any land in mortmain. This seemed to be a sufficiently wide and sweeping enactment to frustrate clerical ingenuity for the future. But it was soon found possible to creep out of the statute by means of a fictitious action called a *common recovery*; "and thus," says Blackstone, "they had the honour of inventing those fictitious adjudications of right which afterwards became the great assurance of the kingdom." This practice also was stopped. Yet still it was found difficult to set bounds to ecclesiastical ingenuity. For they devised a new method of conveyance by which the land was granted, not to themselves, but to a nominee *to the use* of themselves. And it is to this invention that we are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But unfortunately for the inventors themselves they did not long

enjoy the advantage of their new device; for such "subtle imagination" was, by a statute of Rich. II., declared to be ineffectual and void.

We need not trace the struggle further. The Church was at length vanquished; but its brilliant feats of misdirected ingenuity remain impressed on the pages of history, a lasting monument to its astuteness and forensic ability.

This prohibition against leaving land to religious houses was afterwards extended to charitable institutions. It being apprehended "from recent experience" that dying persons might make large and improvident dispositions even for these good purposes, it was in effect enacted by a statute of Geo. II. that no land should be given by will to a charity. This Act has received a very liberal construction; and not only land but everything "savouring" of land is within the prohibition. Thus, money to arise from the sale of land, or money to be invested in land or on mort-

gage, and shares and debentures which give the holder a direct interest in land, are considered as land, and cannot be left to a charity. The prohibition had been gradually extended to an unreasonable extent, but the tendency of recent decisions is certainly to restrict it.

A still more liberal construction has been placed upon the word charity. A charity is not merely an institution for the poor and needy, but includes almost every institution which has for its object the good of the public, or a section of the public. Thus, gifts for the advancement of learning and education, for the spiritual welfare of man, and for "the advancement of Great Britain," are charitable. And even a gift of an annual sum to poor relations is so; and so, too (to cite an extreme case), is a gift to found an institution for studying the maladies of beasts and birds useful to man.

It is important, therefore, when a man makes a bequest to a charity, that he should direct

it to be paid out of such part of his personal estate as he may lawfully bequeath for such purpose. And it only remains to point out that the prohibition merely applies to wills, and therefore a man may give what land he pleases to charities, provided he does so by deed, with certain formalities required by the Act.

Another point on which testators often make mistake, and consequently fail to carry out their intentions, is a gift to illegitimate children. A gift to "children" is of course a gift to legitimate children; and therefore illegitimate children cannot take under it, unless it be clear that legitimate children could never have taken under the gift, and that only illegitimate children could have been intended. It is important, therefore, where a gift is made to illegitimate children, that they should be carefully and accurately described, so as to leave no doubt who are intended. Testators, with no doubt the best intentions, often refrain from describing illegitimate children as such,

but such a course is liable to defeat the testator's object in two ways: it may make the bequest invalid, and it may also make public the fact of illegitimacy by bringing the question before a court of law. It is, therefore, on every ground desirable that they should be clearly identified, as a failure in this respect not merely entails the loss of the gift, but serves to emphasise the stigma which, through no fault of their own, is cast upon them.

There is nothing which seems to annoy testators so much as the knowledge that duty will have to be paid on the property they leave by their wills. They are constantly inquiring whether it cannot be avoided. But there is no way of evading the payment except by a gift *inter vivos*, that is before death. If you leave property by will, it will be subject to duty; the only exceptions being a gift to a wife or husband. Formerly a gift under £20 was also exempt, the result being that legacies of nineteen guineas were until recently very common.

The rate of duty varies from one to ten per cent. according to the nearness of relationship. Thus children pay one; brothers and sisters, three; uncles and aunts, five; and strangers in blood, ten per cent.

It has often been suggested, not without reason, that this duty might very well be increased, especially as regards strangers in blood. And there are certainly few kinds of property which can so well afford to pay a heavy tax. But one objection to increasing it to any considerable extent is that it might lead to a more general evasion of duty, if not by some new and secret device, at least by the open expedient of gifts *inter vivos*. In the end, therefore, the Revenue might lose more than it gained by the change.

It may occur to persons not lawyers that the duty might be evaded by handing over the property on one's death-bed, on condition that the legatee returned it in case of recovery. This, however, is far too transparent a device

not to be guarded against by the legislature; and such a gift, which in law is called a *donatio mortis causâ,* has been made subject to legacy duty, and even to the debts of the deceased.

Marriage revokes a will. This is somewhat curious; for although the law revokes a will on marriage, it imposes no obligation on the husband to make a new will in his wife's favour. It is a delicate and dangerous matter to interfere between man and wife; and the law has in most cases very wisely avoided the difficulty by treating them as one person. It could not, however, altogether ignore the just claim of a wife to be remembered in her husband's will; but it did not apparently see its way to dictate to the husband what provision he ought to make. It therefore simply suggested that some provision would be proper by revoking his will, leaving it to his own right feeling to say what that provision should be. This is unique in legal history, and is, so far as we know, the only

instance in which the law has displayed a delicacy and tender regard for the feelings of others, which, if not foreign to its nature, is at least outside its strict province.

It was stated in a former part of this chapter that the only formalities necessary in making a will were that the testator should sign in the presence of two witnesses. This, however, requires explanation. The Wills Act (1837) provides that both witnesses must be present at the same time, and must subscribe their names in the presence of the testator. In other words, they should all three be present and sign their names on the same occasion. When, therefore, the will is proved it is necessary to show that these formalities have been complied with, and an affidavit for that purpose is required from one of the witnesses. It is usual, however, to avoid the necessity for such an affidavit by adding an attestation clause stating that the formalities have been observed. The usual clause, which is somewhat pleonastic,

runs thus: "Signed and declared by the above-named A. B., the testator, as and for his last will and testament, in the presence of us, both present at the same time, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses."

Any ordinary person may be a witness; but it is important to remember that no one who takes anything under the will should witness it. For a bequest to a witness is void, and so is a bequest to the husband or wife of a witness. The will, however, is not invalidated by such a bequest; for a legatee is a good witness though he forfeits his legacy. But there is no objection to a creditor being a witness, nor is there any to an executor.

It will appear to the reader from what has been said that there is little restriction on a testator beyond the restriction on his leaving land to charities; and though this is practically the only respect in which he cannot leave his

property to whom he pleases, there are some important restrictions on his power of saying how it shall be dealt with after his death.

The most important of these restrictions is the rule which forbids the tying up of land for a longer period than a life or lives in being and twenty-one years after. A testator cannot, therefore, tie up his land for a longer period than can elapse until the unborn child of some living person shall come of age. If, therefore, you were to leave your land to the first son of A., a living person, who should attain the age of *twenty-four*, the gift would be void. For if A. were to die leaving a son a few months old, the gift to the son would take effect at a time exceeding the period of twenty-one years from the expiration of the life of A., which in this case is the life fixed on. But if the gift were to the son at *twenty-one*, then it would be valid as necessarily falling within the allowed period. The rule applies equally to money as to land; and it must be noticed

that a gift, to be good, must necessarily vest within the prescribed period; for if it might possibly exceed the limit, it will not be good, even though it should, as a matter of fact, fall greatly within the limit.

In addition to the limit already mentioned a further restriction is imposed on attempts to accumulate *income* of property for the benefit of some future owner. This rule was occasioned by the extraordinary will of the late Mr. Thellusson, who directed the income of his property to be accumulated during the lives of his children, grandchildren, and great-grandchildren living at his death; thus keeping strictly within the rule already mentioned against tying up property beyond any number of given lives in being and twenty-one years after. To prevent a repetition of the evil an Act was passed which, in effect, forbids the accumulation of income beyond twenty-one years from the testator's death. Any direction, therefore, to accumulate income beyond this period will be

void so far as it exceeds, and valid to the extent it is within, the period. But if the direction to accumulate exceed the limits allowed for tying up property it will be void altogether. It may be added that the Act does not extend to any provision for payment of debts or for raising portions for children, or to any direction touching the produce of timber.

These restrictions, however, though far too important to be passed over, are perhaps too technical to be of much interest to the general reader. The restriction which above all others interests the general public, is the restriction which the law imposes on conditional gifts; and upon this subject, it is evident, much popular misconception exists. The subject is one of public interest, because by means of a conditional gift a testator is enabled to secure a kind of posthumous fame, and ensure to some extent the observance of his wishes after his death. It also acquires an additional interest from the fact that many novelists make

their plots turn on some extraordinary condition annexed by a testator to the gift of his property, which leads to serious though generally quite unnecessary complications and troubles; for in fiction, as in fact, it very frequently happens that such conditions are in law invalid, and therefore ineffectual. It is not, however, at all surprising that such mistakes are made, for the law on the subject is very difficult, and few lawyers, or even conveyancers, would be able to say off-hand what conditions are good and what bad. The latest instance of such a condition in fiction is to be found in a quite recent novel, in which an eminent novelist makes her plot turn to some extent on a gift to children on condition that their mother did not live with them. The point, so far as we know, is a novel one; but we have little hesitation in saying that such a condition is invalid; for if, as is clearly the case, a condition defeating a gift to a married woman in case she live with her

husband, is void, on the ground of public policy, surely a condition defeating the gift if she live with her children must be equally so; and *à fortiori* if the condition is to defeat a gift to children in case their mother live with them.

It would be quite impossible to give the reader any clear idea of the law on the subject in a few words, or even perhaps in many; and our remaining observations must be taken merely as indications of the direction in which the law tends rather than as statements of what the law actually is.

And in the first place it is necessary to remember that there is an important difference between a condition which is to be performed before a person can take the gift, and one which will put an end to the gift if it be not subsequently performed. The former is called a condition precedent, the latter a condition subsequent; and it is often extremely difficult to say to which class a given condition belongs. Without, however, staying to discuss that ques-

tion, it may be laid down as a general rule that where a condition is impossible or illegal it will be void, and if it is precedent the gift will fail, and if subsequent the gift will become absolute. It may also be said, in a general way, that a condition is more likely to be valid when applied to a gift of land than when annexed to a gift of personal property; a refined and unnecessary distinction, for which we are indebted to the old ecclesiastical courts and their civil law.

A repugnant condition, that is, one inconsistent with the estate given, is also void, as, for example, if I give you property on condition that you do not sell it. But if the restraint is partial, as that you do not sell it except to a particular person or within a certain time, it is good. And other familiar instances of valid though repugnant conditions are gifts of property until bankruptcy, and gifts to married women without power of alienation.

Two very common conditions annexed to

gifts are conditions that the legatee shall take the testator's name or shall not dispute the will. But the most important are those in restraint of marriage. We have seen in a former chapter that contracts in restraint of marriage are void; but the rule does not apply with equal force to conditions. Conditions in restraint of marriage are as a general rule good when applied to personalty; but partial restraints are good in all cases, and a condition restraining a widow from marrying again is also good. With regard to gifts conditional on a woman's marrying with the consent of her parents or guardian, the law is, or was, in a very confused state owing to what is called the *in terrorem* doctrine, according to which if a testator declared that the legacy should be forfeited, but did not say what should become of it when forfeited, the condition was treated as mere intimidation, and therefore void; but if the testator gave it to some other person on non-performance of the condition, the condition was good.

But the reader will probably agree with us that it would be useless to consider the question further; especially when he hears that an eminent judge once expressed an opinion that the cases on the point were so contradictory as to justify the court in coming to any decision it thought proper. It may also be thought that to touch thus lightly on a subject so difficult can but serve to confuse the reader; and that may be so; but it will at least serve to show how difficult it is to make a valid will, whether in fact or fiction.

## CHAPTER X.

### MARRIED WOMEN.

"The freedom of unhampered self-direction which woman demands, pressed to its logical conclusion, must issue into two opposite social conditions, either one of which would bring death as of ice, or of fire, to the whole human world."

THE married woman has, with reference to her legal status, been not inaptly described as the "spoiled darling" of modern legislation. And though she can hardly claim to have occupied the minds of legislators to the same extent as some other less deserving objects, she has undoubtedly received a good deal of attention. It was not, indeed, to be expected, in these days of sharp transition, that

her anomalous position should have escaped notice. And though we cannot view without some misgiving a measure conferring legal independence upon those who must ever to some extent remain morally dependent, we have so profound a belief in the unselfishness of woman's motives that we can afford to view with comparative complacency a change which would otherwise fill us with grave alarm. The old law, which had for its object, or at least tended to secure, the prevention of domestic dissension and distrust, was no doubt wisely planned. And it must now be left to woman's tact to avert those evils against which the law once so carefully guarded.

The change in her position has been great and rapid. How different is it now from what it was when a husband not only had complete control over her property but had such control over her person that he was allowed by law *flagellis et fustibus acriter verberare uxorem.* An ancient privilege, it has been quaintly ob-

served, which "the lower rank of people, who were always fond of the old common law, still claim and exert."

This change is no doubt due to the operation of that uniform movement which, Sir Henry Maine tells us, is seen in all progressive societies, namely, the movement from status to contract, the gradual dissolution of family dependency and the growth of individual obligation. But such a movement has obviously its limits and may go too far. And this, perhaps, it has done in making not only the marriage tie but the relationship in all its bearings a mere matter of contract.

The law on the subject has, as every one knows, recently undergone something like a revolution, and is greatly simplified. Indeed, were it not for this, it would be scarcely possible to give any short account of it that would be intelligible to the general reader. It was in its old form a source of terror to the young lawyer, and not unfre-

quently a thorn in the flesh to his more experienced brethren. And though it cannot even now be passed over altogether in silence, since it still to some extent affects women married before 1883, it will be sufficient to give it a mere passing notice.

Under this law, then, and even up till quite recent times, a married woman had no separate legal existence. She was merged and lost in her husband. She had no property; for by marriage she gave to her husband, not merely herself, but all that belonged to her. What she had became his, and what was his remained his own. It was, therefore, very far from the truth for a husband to say—as he solemnly did *in facie ecclesiæ*—"With all my worldly goods I thee endow."

The husband under this state of the law became absolutely possessed of all his wife's money and personal estate, and was entitled to the rent of his wife's land. And he had the same power over property coming to her

during marriage, even though acquired by her own labour. She could not make a binding contract. Nor could she make a will, except by means of a power or with her husband's consent. And she could not sell her land except with his consent and by means of special formalities.

On the other hand, and as some compensation for the loss of her rights, she became exempt from liability. Her husband became liable for her debts contracted before marriage, and for all actions in respect of which she was answerable, and also for her wrong-doings during marriage. If she could not sue, neither could she be sued. It was not, therefore, so very one-sided an arrangement.

On the death of the wife the husband's position with regard to her property remained practically unchanged. He continued in possession of her personal property, and remained in receipt of the rents of her landed property. But on the death of the husband, the wife

emerged once again and recovered her identity. She did not, however, regain all her property. Her landed property returned to her, and so also did any of her personalty of which her husband had not obtained possession during his lifetime. But all the rest was gone; and unless it came to her under her husband's will or his intestacy, she had no claim upon it. Her husband could leave it to whom he pleased. On the other hand she had a right to a share of his land, called dower (which, however, was a sorry compensation since it was so often defeated), and also to a share of his personal estate if he died intestate.

Such was briefly the common law on the subject. It originated at a time when the only property of any value was land; and it was not, therefore, at that time by any means prejudicial to the wife. But with the growth of commerce, new kinds of personal property sprang into existence, and it was then that the proprietary position of the wife became so

greatly inferior to that of her husband. This state of things was felt, at least two centuries ago, to be so unsatisfactory as to need adjusting; and for her sake the laws of property were violated. The Court of Chancery, ever in the van of legal progress, invented "that blessed word and thing," the separate property of a married woman, a doctrine of great importance, established by the Court under a succession of great judges without the aid of the legislature. By this means a married woman could in equity enjoy property independently of her husband. And whenever it was given or settled or conveyed to her separate use without power of anticipation, it was placed out of the power of the husband, and was thus protected from the consequences of his improvidence, misfortunes, or misconduct, under a law which gave him a power, almost unlimited, over her person and her property.

The law as thus modified by equity continued down to the 9th August, 1870, and all women

married before that date are still subject to it, except as regards after-acquired property. In that year the legislature first began to turn its attention to the subject, and an Act was passed, the principal effect of which was to make the earnings of married women their own property, and to give to women married after that date as their own all property coming to them on an intestacy, and also any sum under £200 given to them by will or deed. The effect of the Act was not, however, very important, as the principal property which it secured to her was merely that which devolved upon her under an intestacy; and intestacy, we need hardly observe, is generally provided against by persons possessing property. It gave her, moreover, merely the rent of land so coming to her, and did not enable her to sell or dispose of the land without her husband's consent. These rights, however, such as they were, were conferred upon all women married after the 9th August, 1870.

In 1874 another Act was passed, which, it

will be enough to say, simply dealt with the husband's liability for his wife's debts.

And in 1882 came the revolution. All, or almost all, the common law rules were swept away. And married women were at last free. We cannot better summarise the effect of the Act than by saying that it places all women married after it in much the same position as single women. They might just as well, so far as regards their property, have never been married. But women married before that date are not in the same enviable position. They are only to have such property as comes to them on or after the 1st January, 1883, and only where there is no marriage settlement. And this is one of the unfortunate though unavoidable consequences of the Act, that it gives to the young and inexperienced matron a freedom and independence which it denies to her more experienced and reliable sisters. What the effect of the Act will be it is at present too early to judge, but it is at least

certain that it will give rise to many legal, if not domestic and social difficulties. It seems to us to evidence a great change in the sentiments of the community, and is, perhaps, one of those legislative efforts which mark the progress of a wide social revolution.

The broad effect of the Act, then, is to make all women married after its commencement single women as regards their property, and to place all women married before the Act in a like position as regards property acquired by them after the Act. It is not proposed to weaken that broad and simple proposition by considering the Act in detail. But since a married woman, however theoretically single, is still a married woman, and does in fact possess a husband, it will be necessary to consider some practical questions arising out of the relationship which no Act of Parliament can wholly obviate. But before doing so it may be well to consider very briefly the policy

and probable consequences of the Act apart from its immediate legal effect.

If we look simply to its immediate purpose, we shall probably join in the chorus of approval with which its passing was very generally hailed. But if we look more closely we may possibly doubt whether it is calculated to secure the object it had in view. What was the object of the Act? Clearly to secure to married women the control of their own property, independently of their husbands; in other words, to save them from their husbands. Is this object likely to be secured? There is some reason for thinking that it will not. The policy of the law courts is almost always more far-sighted than the policy of the legislature. And we think it has been so here. Even the old common law rules, which seem at first sight so inequitable, were framed, or at least suffered to remain on the assumption that the husband is the best guardian of his wife's property.

And, no doubt, where the husband is a prudent man the assumption is sound. The Court of Chancery, seeing that all husbands were not wise and prudent, stepped in to supply the defect, and by its doctrine of separate property afforded to the wife a protection against the imprudence and misconduct of her husband. All this is sound policy, founded on the experience of ages. No doubt there were hardships; but they were due, not so much to the policy as to the defective working out of the policy. There was indeed room for improvement. But it may be questioned whether the legislature acted wisely in effecting reform on the lines of a policy diametrically opposed to that of the law courts.

The legislature seems to have proceeded on the assumption that no husband ought to be trusted with his wife's property, and that no wife is subject to the influence of a bad husband. Both of which assumptions may be fairly inferred from the Act itself, since it

allows no control to the husband over his wife's property, and affords the wife no protection against her husband's influence. If a husband is prudent, there is no better guardian of his wife's property; and if he is not, there is no one against whom she needs more protection. When we remember the immense influence which husbands have over their wives, and often greatest when most injurious, it must seem a questionable proceeding to place the wife's property at the mercy of that influence. But there is nothing in the Act to prevent a wife from handing over, through fear or affection, the whole of her property to her husband. To give women property in this way is, it seems to us, to give it them rather in word than in deed.

If husbands are to be trusted, there is no necessity for the Act. And if they are not, the Act falls short in not providing some check on their influence. Women, moreover, require to be protected, not only against their husbands

but against themselves. They are not always wise and prudent. And when that is the case, even a husband's control may be better than none at all. But the Act allows no such control. And a husband may now have to stand by and see his wife lose her money through an imprudence which his practical experience is no longer allowed to control. Under the old law, moreover, there was some slight safeguard in the fact that the separate property of married women was held by trustees upon trust for them. But even this check is removed; and they are now enabled to hold property "without the intervention of any trustee." It may be doubted, therefore, whether the Act will secure even its immediate object; or whether it were true wisdom of the legislature to interfere between man and wife; and we think, moreover, that the world can ill afford in these days to lose even in name that oneness of person which both the law and the Church have always regarded as the basis of the relationship.

This questionable tendency of the Act will, however, be greatly limited by the existence of settlements, which neither in the past nor the future are affected by the Act. There is, however, the danger that people will think marriage settlements no longer necessary, whereas it appears to us they will be still more needed. By means of a marriage settlement all the restrictions which are necessary can be imposed, a rough kind of community of interest secured, and all disputes and discord avoided. And if, as seems likely, the practice of making marriage settlements should become less common, it will in our opinion be a matter to be deplored. And here it is very material to remind the general reader that marriage settlements usually contain a covenant by the wife to settle all property acquired by her after marriage, and where that is the case the property so coming to her will not be hers by virtue of the Act, but will be held upon the trusts of her marriage settlement.

But whatever may be thought of the general policy of the Act in conferring freedom of property and contract on married women, there can be little question about the wisdom of that part of it which makes the wages and earnings of married women their own property. Amongst the poorer classes, where wives are so often bread-winners, it is certainly desirable that their earnings should be put beyond the reach of improvident husbands; though it must not be forgotten that this is little more than a re-enactment of the Act of 1870, and that a married woman has long had the right, where deserted by her husband, of obtaining a protection order which answered the same purpose.

Here again, however, there is no check on the husband's influence. On the contrary, the Act declares that if a wife lend her husband money she shall not have it back until all her husband's debts are paid. If her husband by threats or endearments—and how many

women are beyond the reach of either?—induces her to make him a loan, she might just as well in many cases have never had any separate property. The Court of Chancery in its great wisdom foresaw this danger, and provided against it by giving her merely the income and refusing to allow her to part with the property itself, even to her husband. And thus her property remained a benefit to both, and beyond the reach of either.

Once having given her separate property, other rights and liabilities naturally followed. She can now carry on business on her own account; she can become a trader and consequently a bankrupt. She can insure her life. She can enter into contracts, and sue and be sued upon them. She can sue and be sued, not only in respect of contracts, but in respect of injuries done to or by her; and can even sue her husband, and give evidence against him. All which it may be said is only right and just, but all which many of us will see reason to deplore.

With the extension of her rights, her liabilities have naturally increased, and those of the husband proportionately diminished. The husband is only liable for his wife's debts and liabilities contracted before marriage to the extent of the property he has acquired from or through his wife. All contracts entered into by her will be assumed to be made in respect of her separate property, and therefore when she orders goods she will be assumed to pledge her own credit and not her husband's; though whether this will apply to necessaries, such as household goods, is not very clear. We should think not; for otherwise it would seem necessary for her on every occasion to tell the tradesmen that she was ordering the goods for her husband and not for herself. A married woman is also now liable to the parish for the maintenance of her husband, children, and grandchildren.

Some minor provisions of the Act declare that where stock or shares are standing in the

name of a married woman, or money is deposited in her name at a bank, such stock, shares, or money shall be considered her separate property until the contrary is proved.

Upon the death of a married woman her property, if not settled, will pass under her will, for she has now a complete power of disposition. If she make no will, she will at her death become again a married woman in accordance with our old notions; and her property will devolve according to the old law. At least this may be assumed to be the case since the Act is silent on the point. The husband will, therefore, on her death take the whole of her personal estate and a life interest in her land and houses.

It may in conclusion be broadly stated that the change in the law affects only those married women who have or acquire property. Those who are fortunate, or unfortunate, enough to have none will still be practically indistinguishable from their husbands, will still be at one

with their natural helpmates, will still be free from responsibility and care, will still be exempt from the unhappy possibility of having their domestic differences dragged before a public tribunal.

The Act has many defects both of form and arrangement, but these are small matters compared with its policy and tendency. Those who look with favour on the change will view it as weeding out a barbarous archaism and abolishing the crude rules of an imperfect civilisation. But we cannot wholly regard it in this light. We do not positively affirm that its effect will be prejudicial; but we cannot view without concern so great a step towards woman's complete independence. And proprietary independence cannot be altogether dissociated from personal independence. It must not be forgotten that the age which witnessed woman's greatest personal and proprietary independence witnessed also the laxest marriage tie which the Western world has

ever seen; and that it was the civilising influence of Christianity, which brought back some of the old dependence and restraint. No one questions woman's worthiness to receive these proprietary rights; and looking at the question simply from the point of view of abstract justice the measure is unexceptionable. But that is too narrow a view to take. It is a social question, in which social considerations outweigh the claims to individual liberty. Freedom of action, in so many cases of doubtful expediency, is in none perhaps of so questionable a tendency as here. And since we doubt whether, from a social point of view, the marriage tie can be too close, or the unity of person and interest too complete, we question whether a policy which tends to sever that unity and confer on women "the freedom of unhampered self-direction," can be an ultimate social good.

## CHAPTER XI.

### EVIDENCE.

"It is the noblest act of human reason
To free itself from slavish prepossession."

BUTLER.

THE difference between assertion and fact, between belief and proof, between opinion and evidence, is a very real, though little realised distinction. In every-day life it has scarcely any existence. What we say is a fact, what we think is true, what we believe is proved. Bias and prejudice sway us with an almost absolute mastery. And this is to a great extent unavoidable. It would be impossible in the ordinary affairs of life to require that moral probability, generally called moral certainty,

which is the highest degree of proof to which legal evidence aspires. For just as mathematical certainty is unattainable by courts of law in the administration of justice, so is moral certainty beyond the reach of the individual in the daily affairs of life.

Legal evidence is little more than a common-sense view of what constitutes sufficient probability upon which to act or form an opinion. It is in reality a body of very simple and untechnical rules which, it is not too much to say, any intelligent and impartial man would be led by the light of nature to act upon in prosecuting an inquiry or settling a dispute. And though it would not, as we have said, be practicable in daily life to require the same degree of probability as a basis for our judgments and our actions, as is necessary to satisfy courts of justice, it may fairly be said that it would be better for us all did we arrive at our conclusions by a process of reasoning more nearly assimilated to that adopted by the courts. The chief

effect or tendency, and a beneficial one when not too narrowing, which a legal training has upon the mind, is to make us attach the right degree of importance to facts and statements, and so to form a juster, though some would say a narrower, estimate of their probability, and therefore their truth.

There is in the public an innate and common honesty, evidenced by the proverbial love of fair play attributed to Englishmen, which makes them not only desire to do what is just, but to arrive at what is just by a sort of rough and ready method of weighing evidence. And therefore it may seem that they would not be averse to adopting any simple rules clearly laid before them that would the better enable them to arrive at a sound conclusion. But unfortunately there is a common instinct of humanity which militates to a great extent against this love of justice. There is a universal tendency amongst all men to take sides on a question and

become partisans. And not only so, but they view with disfavour any one who is independent and impartial enough to stand aloof from both sides, and take the *juste milieu*; such a man invariably winning the sympathy of neither and the displeasure of both. The judicial frame of mind is rare, and perhaps can only be acquired by training. It is human nature to be an advocate, not a judge.

It seems likely, therefore, that though the public would be ready to adopt the simpler rules of evidence in theory, they would disregard them in practice; for, though not necessarily inconsistent with the duty of the advocate, they would undoubtedly be found irksome by the partisan. That consideration, however, need not deter us from attempting to give some general idea of legal evidence, since our object is not so much to supply the public with a guide to right conclusions as to justify the proceedings of the courts, which to the lay mind often seem unnecessarily devious and technical.

The chief point, and almost the only point, which it will be necessary to consider is what in a general way is the evidence which the courts will not allow to be given, and why it may not be given. In prosecuting an inquiry into the truth or falsity of a matter, an ordinary person listens to everything that is said, and indeed often invites irrelevance by suggesting that the witness shall tell him everything he knows. "Now let me hear all that you have to say," is a common method of opening an inquiry conducted without reference to legal evidence. But the court's method is very different. So far from inviting voluntary statements, it is perpetually engaged in repressing freedom of evidence and in trying to impress upon witnesses the necessity of confining their statements to answering the questions asked them.

The fact is, irrelevance is a fault into which we all glide with unconscious facility, and the moment our attention is relaxed we are apt to run off the lines of our inquiry. It is a natural

tendency to which all are subject, and from which the most logical mind cannot claim to be altogether free. Stringent rules therefore are necessary to counteract this tendency, for since irrelevance is one of those things which *vires acquirit eundo*, it would render the administration of justice impossible were it not promptly checked. This is the principal, though not the only objection. And we have lately seen to what an inordinate length even judicial proceedings may be carried by the irrelevance of parties conducting their own cases, an irrelevance which the judges find it practically impossible to suppress.

Irrelevance may be so glaring as to be palpable to every one. A case in point is the story told to account for the origin of the trite expression, "*revenons à nos moutons.*" A lawyer pleading the cause of a client, who had lost some sheep, talked of everything but the matter in question, when his unfortunate client recalled him by the above exclamation.

A similar instance is given by Martial in one of his epigrams, which probably gave rise to the later story. These are extreme instances in which the irrelevance is manifest; but the line which separates relevance from irrelevance is so fine, and the transition between the two so gradual, that it is often extremely difficult to say what is relevant and what is not. So far, however, as legal evidence is concerned the line is pretty sharply defined, and the law considers as irrelevant many facts which most people would consider relevant, and which are in fact more or less so. Let us consider very briefly what these facts are.

We have said that an intelligent man in conducting an inquiry and acting as judge would probably be led by the light of nature to adopt some such rules of evidence as are observed by the courts. Suppose, for instance, you were called upon to inquire and decide whether a particular charge was true; and suppose the charge was a grave one and ought there-

fore to be clearly proved, and that your time was valuable to the public and ought not therefore to be wasted, would you not refuse to take as evidence—(1) what the witness had heard other people say, and which might be mere gossip; (2) what the witness's own private opinion was about the matter; (3) facts which though similar were unconnected with the case in question; and (4) facts which tended to throw discredit on the person charged? All these things are, it is true, to some extent relevant, but they are so clearly insufficient to establish a grave charge that it would be unsafe to make them the grounds of a decision. And these are the principal facts which the law declares irrelevant; the four principal rules relating to the inadmissibility of evidence being framed to exclude these four classes of facts. The courts, therefore, will not allow a witness to give hearsay or second-hand evidence. They will not allow him to give his own opinion. They will not admit

similar, though unconnected facts. They will not admit facts as to the character of the person whose conduct is in question. The reason of these rules is tolerably obvious; and it may be added that the exceptions to them are such as would naturally suggest themselves as reasonable and proper.

The objections to *hearsay* evidence are so obvious as to hardly require stating; yet few people go into the witness-box without showing a disposition to tender such evidence. It is an inflexible rule that the best evidence must be given, and hearsay is clearly not the best evidence. It is not, moreover, a statement on oath, but a mere report of what has been said by an absentee, who may have spoken inadvertently, who was under no obligation to speak the truth, and was not subject to cross-examination. The simple reason, therefore, why such evidence is not admitted is that it is not likely to be true, or at least is not sufficiently so to make it trustworthy. This, indeed, is the

principle upon which the court proceeds in the rejection of evidence generally. And that being the principle of the rule, we should expect to find the rule give way whenever it conflicted with the principle, that is, whenever hearsay was likely, from its nature or the circumstances under which it was given, to be true. And that is exactly what we do find. There are certain cases in which hearsay is likely to be true. Thus, where a person makes a voluntary confession, or an admission not in his favour, or where he makes a dying declaration, or a declaration against his own interest or in the course of business. In all these cases there is a strong probability that the statement is true, and it is therefore admitted. And these are the principal exceptions to the rule.

It is clear that the first, and as a rule the only, duty of a witness is to state such facts as are within his own knowledge; and that it would never do to allow witnesses to give their private *opinions* on the matters in dispute.

Apart from the waste of time that would be caused by allowing people to air their opinions in the witness box (and there are many who would never tire of doing so), there is the further objection that the witness would be usurping the functions of the judge and jury. But the rule, as we might expect, is relaxed whenever the opinion of a witness can be regarded in the nature of a presumptive fact. Thus the opinions of skilled or scientific witnesses are admissible on matters of a purely professional or scientific character. A doctor, for instance, may give his opinion on a medical question; and in the Belt case we have recently seen artists giving their opinion as to the degree of artistic merit displayed in works of art. So, too, we often hear of experts being called upon to give their opinion as to handwriting, or as to the practice in particular trades. Such evidence is not, however, confined to matters of a purely scientific or professional nature, but will as a general rule be admitted in any matter of a

sufficiently recondite nature to call for special explanation and in which men skilled in it will mostly think alike.

A witness can only give evidence of facts which are essentially connected with the matter in dispute, and will not be allowed to give evidence of *similar* transactions with third parties. When the question is whether a person said or did something, evidence that he said or did something of the same sort on a different occasion will not be admitted. Thus, where the question is whether A. committed a crime, the fact that he formerly committed another crime of the same sort is irrelevant. "You are not," says Mr. Justice Stephen, "to draw inferences from one transaction to another which is not specifically connected with it, merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference. . . . It is, indeed, one of the most characteristic and distinctive

parts of the English law of evidence; for this is the rule which prevents a man charged with an offence from having either to submit to imputations which in many cases would be fatal to him, or else defend every action of his whole life, in order to explain his conduct on the particular occasion." It must not, however, be supposed that this salutary protection is the main object of the rule; the broad principle, we take it, being that such inferences could not, as a general rule, be safely drawn. The rule applies equally to civil proceedings, and may operate otherwise than as a protection. Thus, when the question is whether a person sold good articles on a particular occasion, it is not allowable to show that he sold good articles of the same description on previous occasions.

The exceptions to this rule are important, though they apply more frequently to criminal than to civil proceedings. Where it is necessary to prove intention, knowledge, malice, or other state of mind, such similar facts will be ad-

mitted to prove the existence on the occasion in question of the prisoner's state of mind. Thus, if a man be charged with receiving property knowing it to have been stolen, the fact that he received many other stolen articles and pledged them, will be deemed relevant to show that he knew the property was stolen. And in like manner, where a man is charged with uttering counterfeit coin, evidence that he uttered counterfeit coin on other occasions will be admitted to show that he knew the coin was counterfeit.

And now we come to the fourth and last class of excluded facts. The fact that a person is of a particular *character* is, as a rule, deemed to be irrelevant to any inquiry respecting his conduct. Evidence of good or bad character is generally irrelevant and inadmissible in civil cases, unless character be of the substance of the issue. But in criminal proceedings the fact that the person accused has a good character is admissible; though

the fact that he has a bad one is not, unless it be itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad one is admissible. And in giving such evidence it is only allowed to give evidence of general reputation, and not of particular acts by which that reputation is shown. All this is natural and reasonable, and free from difficulty. We all know how fallacious a guide reputation is, in estimating the probability of a man's conduct on a particular occasion. We know the danger and injustice of giving a dog a bad name; and how readily it is assumed that a man of bad character *must* be guilty; and on the other hand we know how often a spotless reputation is ruined by a single false step or momentary weakness. We are all liable to err, the wisest of us may slip, and the best fall. Evidence of character therefore is rightly excluded. At the same time it is consistent with the natural love of fair play, and the

law's leaning towards mercy, that a prisoner should have every chance, and should be allowed to give evidence of good character, subject to the reasonable condition that such evidence may be rebutted by evidence of bad character.

We have now briefly stated what Mr. Justice Stephen calls the four great exclusive rules of evidence, and we may here once for all express our indebtedness to the masterly digest of that learned judge. These four rules are practically all which it concerns the general reader to know, and will be sufficient to enable him to understand something of the proceedings of a court of law. Space will not permit us to show how particular facts are to be proved, or by whom they are to be proved; for information on these points the reader is referred to the work just mentioned. Before concluding, however, there are one or two matters which may be usefully mentioned.

We have already mentioned that the best evidence must be given; and this is a fundamental rule of evidence. A copy of a document, for instance, will not be admitted, if the original can be produced; a writing will not be admitted, where the writer can be called as a witness; and, as we have seen, a witness will not be allowed to repeat what another person told him, since the latter can be called to prove the statement. But if the best or primary evidence cannot be obtained, then secondary evidence is admissible. And the rule does not extend to secondary evidence; for there are no degrees of secondary evidence, all such evidence being as a general rule considered as of equal value.

The law presumes many things without proof. It presumes innocence; it presumes that every person intends the probable consequences of his own acts; it presumes that a person, who has not been heard of for seven years, is dead; it presumes that every one

knows the law; and many other things that need not here be mentioned.

The law not only presumes innocence, but, as a rule, presumes that what has been done has been rightly done. It will not, therefore, presume fraud, nor in general any wrongful act; and consequently the burden of proof is upon those who assert such facts. The burden may, in the course of a case, be shifted from one side to another; but as a general rule it lies in the first instance on the party against whom judgment would be given if no evidence were produced on either side.

Every one who visits a court of law for the first time must be struck with the frequency of the objections raised by one side to the questions put by the other. In many cases the objection is made on the ground that the question suggests an answer which would be irrelevant evidence; and the reader will now be able to form some idea of what questions would elicit facts falling within one of the four

classes already mentioned. But perhaps the most frequent ground of objection has yet to be mentioned. There is a rule (which is one rather of procedure than of evidence) which forbids leading questions. Leading questions are those which suggest to the witness the answer which he is expected to give—where the words which he is required to utter are put into his mouth. Such questions cannot be put to one's own witness on a material point, if the other side object. The foundation of the rule is, that the witness is favourable to the party who calls him. Such questions may, therefore, be put in cross-examination, or whenever it appears that the witness is hostile; or his evidence cannot be otherwise extracted.

We have reserved for the last our consideration of what, to the general reader, will probably be the most interesting part of the subject, namely, the question how far a witness is bound to answer impertinent questions. We say *impertinent* advisedly; for whether the term be taken

in its strict sense as meaning not pertinent to the inquiry, or in its popular sense as meaning offensive, there is little doubt that many questions put to witnesses are fairly deserving of the term. The public naturally feel somewhat strongly on the matter, and, indeed, have reason to be dissatisfied; for it can hardly be said that the practice, in its more objectionable form, is necessary for eliciting the truth.

Broadly speaking, the only questions which a witness can refuse to answer are those which tend to criminate himself. No one is bound to answer a question if the answer would in the opinion of the judge tend to expose the witness (or his wife or her husband) to a criminal charge or to a penalty or forfeiture; though he cannot refuse to answer on the ground that it would show that he owes a debt, or is otherwise liable to a civil action.

With this exception a witness is bound in cross-examination to answer all questions, though they tend to shake his veracity, and

even shake his credit by injuring his character. And it is to this last class of questions, and the extreme latitude allowed in putting them, that some objection may reasonably be taken. It is a well-known fact, within the experience of every one familiar with courts of justice, that witnesses are not unfrequently compelled to answer questions which simply tend to disgrace the witness, and have no material bearing on the question at issue. A striking instance is afforded by the Tichborne case, where, though the simple issue was whether the Claimant had committed perjury, one of the witnesses was compelled to answer a question whether he had not many years previously committed adultery with the wife of one of his friends. An opinion has been expressed by Mr. Justice Stephen, who may be considered the highest authority on the subject, that the court has a discretion to refuse to compel a witness to answer such a question when the answer would not affect his evidence. And that the practice of putting

such questions, which is a modern one, requires this qualification. "I shall not believe," he writes, "unless and until it is so decided upon solemn argument, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. . . . . If this is the law, it should be altered."

After the expression of such an opinion we can hardly doubt that the discretion exists. But it is clear from the timid way in which it is exercised that it requires further authoritative sanction. But even this we think would hardly meet the necessities of the case. Such questions should not only not be answered, but they should not be asked; for the moment such a question is asked half the mischief is done, though no answer be compelled. There ought,

therefore, to be some check on the putting of such questions; and a sufficient check would probably be imposed, if the judges not only refused to compel answers, but actively discountenanced the putting of such questions.

# CHAPTER XII.

## THE LEGAL PROFESSION.

"And of all worldly blessings I account it not the least that the courts of justice, both of law and of equity, are furnished with men of excellent judgment, gravity, and wisdom." COKE.

WHEN we remember how much we owe to law—how our lives, our liberty, our property depend upon it, it may seem a strange thing that the legal profession should have incurred so much public odium. No liberal profession has ever been the object of more frequent sarcasm or the butt of more persistent and virulent abuse. From the earliest times down to the present day the one sentiment echoed, with varied iteration, from press and pulpit has been,

"Woe unto you, ye lawyers!" That the law should not be popular is not perhaps to be wondered at, seeing that it is human nature to love the partisan rather than the judge. But that the whole profession should excite such bitter animosity is certainly a little surprising. That it deserves a tithe of the obloquy cast upon it seems to us not only a fallacy, but a fallacy which it is difficult to account for.

The sentiment, however, must have had an origin. A prejudice so universal could hardly exist apart from some abuse, either real or apparent. And though it may not be possible to trace it to any one source, a variety of causes may be suggested as tending to produce it.

From this feeling of suspicion extended to the profession at large, the judges however are, most happily, free. It is indeed satisfactory in these days of doubt and distrust, when every institution is on its trial, to be able to point to one, and that the most important, which is beyond the reach of public cavil. Under keen

and unceasing criticism the integrity of the Bench remains unquestioned; and is, it is not too much to say, the brightest jewel in the English Constitution. The unsullied career of its great judges, broken but here and there by evil example, are annals of which the nation may well be proud. The fierce light which beats upon the throne, and yet more fiercely upon the English Bench, leaves no spot or stain revealed upon its purity. It is a rare thing to hear even the discretion of judges called in question; but against their impartiality not even Slander's self dare whisper. And even the cases, in which their discretion is questioned, do but serve to show how vigilant is the criticism, and how slight the occasion which draws it forth. When we remember the host of disappointed suitors, we may well see cause for wonder, not that the Ermine is spotless, but that it should appear so to all men. And this confidence in the judges, so striking a contrast to the suspicion with which the profession

generally is regarded, is not misplaced. If law is the grandest monument of human reason, the purity of the Bench is the fairest instance of official integrity.

The popular prejudice against law and lawyers is no doubt partly due to the common belief that the law is ever busying itself with subtletics and technicalities, and drawing fine distinctions without a difference.

Nor can it be said that this belief is altogether unfounded. The remark of a great legal authority that a certain decision was enough to startle any one who was not sufficiently learned to have lost his common sense is a remark which is applicable to many cases besides the one which gave rise to it. Nor can any one study the more intricate branches of law without being at times tempted to endorse another remark of the same author: "Reader, shut up thy understanding, and bow before the idol of authority."

The public, no doubt, often believe this to be

the case when it is far from being so. They think it the rule, not the exception. But though it exists as a frequent exception, it is not, as the public believe, a general rule. In a complicated state of society the law must necessarily be full of technicalities, subtleties, and fine distinctions; nor could it ever be made perfectly simple by any administration, however enlightened. But that it is in many respects over subtle can hardly be denied; and the reason is that we do not sufficiently realise the fact that law is based on common-sense principles. We do not for a moment forget the importance of certainty in law, nor the sacredness of precedent as a barrier against the invasion of arbitrary power. At the same time it is quite possible to see how too great a desire to secure certainty may lead to uncertainty, and how too slavish an adherence to decisions may shake the soundness of the principle embodied in them. Both judges and lawyers are too apt to lose

sight of the important truth that the law consists of principles, not cases, and that cases do not establish principles, but merely illustrate them. They are too apt to consider whether a case before them falls within the four corners of a previous decision, and not whether it is governed by the principle illustrated by that decision. And to this forgetfulness of the fundamental nature of law is due much of the unreasonableness of which the public complain. We need not look long for an illustration. Many instances will occur to the lawyer in which the law, starting with an intelligible and rational principle, has been so maimed and mutilated by fine and unnecessary distinctions, that the original principle has been altogether lost sight of or wholly destroyed. The last case may be the logical outcome of the previous ones, and may be unavoidable, but though the mischief may then be clear, it is too late to go back to the original principle. In the multitude of decisions general

principles are forgotten; and overwhelmed with the all-engrossing task of distinguishing cases, the legal mind fails to grasp the *rationale* of the subject. There must always be this danger, unless not only the principle but the reason of the principle is kept in view; in other words, unless the fact that cases illustrate principles and do not establish them is constantly borne in mind. When we see a judge feel bound to decide a case in the teeth of a recent Act of Parliament, and sanction in Court what in Parliament has been condemned, we need not wonder that the law is accused of spinning fine webs of sophistry at the expense of common sense.

To some extent this defect is inherent and inevitable. The study of law naturally induces us to look upon it as a mass of isolated decisions, or at best a set of cut and dried rules. The popular view, that it is or ought to be a set of living principles, is no doubt the right one, though the public are little aware of the

difficulty of applying broad principles, a difficulty which almost inevitably leads to technicalities and refinements. The mischief caused by the defect is considerable. In its anxiety to avoid the uncertainty of broad principles the law is led into conflicting decisions, and thus brings about the very uncertainty which it seeks to avoid. A strict adherence to sound principles is, however, quite possible without a slavish following of decided cases; and though this may in practice be found difficult to accomplish, the difficulty would be greatly lessened were the profession more in the habit of regarding the principle and not the case as the matter of first importance.

It may be said that a broad view is a loose view; and that may be so. But it does not follow that a broad principle need be loosely applied; and a slavish regard for previous decisions does too often lead to the loose application of the general principle. We would have the courts steadfast in their refusal to

infringe a general principle for the sake of a particular convenience, and deaf to that very common and popular appeal :—

"To do a great right, do a little wrong."

It is indeed to this appeal, subtly and indirectly urged, that we owe so many of the false distinctions and cramping decisions that make the law unintelligible and unpopular, and even at times a travesty of justice.

That the law is to a great extent made or rather declared at the expense of the suitor is sufficient in itself to make it unpopular. There is no means by which a doubt can be removed or a clear principle enunciated except by a law-suit. A doubtful point is left to stand for years, till some unlucky suitor raises it; and, "until this happens, the judges themselves have no authority to remove it, and thus it remains a pest to society, till caught in the act of raising a lawsuit." The unlucky suitor who is thus instrumental in declaring the law may well be excused if he fail to see the beauties of a

system or the merits of a profession which cost him so dearly. It would indeed be an advantage if some plan could be devised by which the House of Lords could occupy some of its spare time in enunciating principles and removing doubts.

Excellent as it is in substance the law is very defective in form, and consequently uncertain and expensive. We have suggested rightly or wrongly one of its causes, and to some extent a remedy. The only real remedy, however, is obviously a code. But, as an eminent judge has said, it would be as difficult to get Parliament to paint a picture as to get it to make a really good code; and it would be almost as difficult to get it to delegate its powers to persons capable of exercising them properly. We must look, therefore, to the judges rather than to the legislature to simplify the law.

Litigation must always be a somewhat expensive luxury, though it might be very much cheaper than it is; and that it is so

expensive is to some extent the suitor's own fault. If the public will persist in employing only leading stars of the first magnitude, they must bear the cost, and, moreover, run the risk of their not shining just when their light is most needed. Aided and abetted by solicitors, they deliberately throw all the work into the hands of a favoured few, and thus run up the fees of fashionable counsel. And so long as solicitors think they can evade responsibility by employing only those with great names, it is difficult to see how this can be avoided, except by making solicitors responsible for their counsel's absence. If solicitors were liable to their clients, and counsel to the solicitors who employ them, solicitors would not be so ready to take briefs to those already overwhelmed with work, and counsel would be more chary about accepting work they could not properly attend to. This would, we admit, be but a partial remedy; but it would do something to disperse work,

and thus benefit both the Bar and the public. We should be sorry for some reasons to see the fees of counsel changed from an *honorarium* into a *quantum meruit*, but we confess we see no other means by which the evil is to be mitigated.

The evil is a necessary result of free trade, and is to be met with in all professions; but it exists in an aggravated form at the Bar. So long as the world lasts we may expect to have our sense of just proportion shocked by the contrast afforded by Dives and Lazarus; but in the plurality of cases the disparity is due to causes which are economic and more or less uncontrollable. At the Bar, where the disparity is most glaring and artificial, it is almost wholly the result of chance. One man makes £20,000 a year, while his equally able brother makes £200 or nothing. While one has greatness thrust upon him; another, not less deserving, finds but too late that he has embarked all his hopes and energies in a

profession in which neither brains nor industry can achieve success or even a livelihood, without the necessary adventitious aids.

It never seems to strike the public mind that there can be destitution at the Bar, but such does undoubtedly exist; and, but for the fact that so many barristers have private incomes, it would be very wide-spread. Instances are not unknown of men working and waiting, living on paupers' fare, and shutting themselves out from society into which they could not afford to enter, till disappointment and starvation had done their work and ended a blighted existence and a hopeless struggle. Had Dickens turned his genius in a different direction, and depicted the threadbare counsel instead of the slipshod suitor, he would have found an equally pitiful but far more worthy subject for his romance. These, of course, are extreme cases. But when we remember that a man may think himself lucky if, after ten or fifteen years'

hard and profitless labour, he makes £500 a year, and that even this is precarious and liable to be determined by illness or an accident, when we remember that year by year he sees the bread taken out of his mouth by legislation, we may fairly conclude that no body of men is so hard-working or so ill-paid as the rank and file of the junior Bar.

There is perhaps a remedy—or, at least, a partial one—for this state of things; but it is one which the Bar itself hesitates to apply, and that is the amalgamation of barristers and solicitors. The distinction is an anomaly, and it is surprising that the monopoly of the Bar has so long been suffered to remain. There is but one valid argument in its favour, namely, that it tends to the independence of the Bar, and indirectly to that of the Bench. But apart from this there is little to be said for it. It seems to us to benefit neither the public nor either branch of the profession, except perhaps leaders, for whose sole benefit it could not of course continue; and, moreover, the distinction might

be retained, if thought advisable, as regards leaders. The division of labour argument is not one which applies to an artificial distinction such as the one in question. So far as division of labour is necessary it will obtain, whether with or without the distinction; but so far as the division is unnecessary it ought not to be forced by an artificial arrangement. The medical profession offers an analogous case. There a man may practise both as a physician and surgeon, or may confine himself to either branch; but the law does not force him to choose between the two and prohibit his practising in both. Nor is it likely that the medical profession would in any way gain by such a restriction. In most legal business of importance it would probably be always found convenient to divide the labour as at present, but in a large, and perhaps the larger number of cases, the division is at least unnecessary, if not hurtful.

We should not, however, anticipate any great result from the change. It might possibly benefit

the public by lessening expense, though not to the extent most people suppose. It would probably also benefit a considerable portion of the junior Bar, though they might possibly lose as much as they gained by the alteration. But whether the work would be better done or the administration of justice improved, is at least doubtful. It would, however, have one certain result. It would do away with the false glamour and fictitious attraction which draws so many men to the profession. To be a barrister would no longer be its own reward. The crowd of legal aspirants would be greatly thinned; and the Bar would cease to be the most overstocked of all the liberal professions.

This would no doubt be a gain, but it can hardly be urged as a sufficient reason for the change, unless the public would also reap some advantage. The latter, however, believe, rightly or wrongly, that the expense and other matters of which they complain are due in some measure to this distinction and monopoly; and therefore it is probable that before long

the Bar will be called upon to show the necessity for its retention. The change would, in our opinion, bring but a slight pecuniary advantage to the public, and that benefit would be more than counterbalanced if the tone of the profession were to be in any degree lowered. Indeed, whatever the benefits secured, they would be dearly purchased (if, as we are often told, they would be) at the expense of the independence of the Bar and the dignity of the Bench. To these we owe far more than is commonly supposed, and they are closely, if not inseparably connected. Some urgent public need ought therefore to be shown before we sanction any change which could in ever so slight a degree injuriously affect the Bench.

The profession has its defects and drawbacks, and, it must be added, its abuses; and though the latter are mostly partial and comparatively unimportant, they give rise to a good deal of complaint and prejudice. To some of these we have referred, and others we need not here particularise. But there is one great

general defect common to the whole profession, to which all others are mainly due, and which lies at the root of all popular prejudice and suspicion. The one radical fault of the profession, as we have already to some extent pointed out, is a narrowness of perception. Its most urgent need is breadth of view, wide induction, and a higher conception of the subject it deals with. The whole body is tainted more or less with the vice which is seen at its worst in the pettifogging attorney. The whole profession, the whole system of law, is vitiated by the defect. It is too much the habit to regard law as a mere money-making machine, as the means to get the better of one's neighbour, as a mere question of quibbles. We see it in the prominence given to costs, in the importance attached to technicalities, in the special pleading, which has become a by-word. We see it in the triumph of the lawyer when he snatches a verdict or judgment in the teeth of evidence, law, and common sense, in the comparative failure of eminent lawyers in the

House of Commons, and in the pages of almost every law-book that is published. Nor need we wonder that a habit so universal has its effect upon our judges and is even to be traced in the highest court of appeal. Why is this? Is it that the law narrows the lawyer, or the lawyer the law? There can be little doubt that it is the latter. We twist the law to serve our own small purposes, and mar its fair proportions to secure a temporary advantage. And thus it is that the law loses its symmetry and its grandeur, and the evil that we do reacts upon ourselves. It may be that the present confused state of the law, brought about by this defect, and reproducing in ourselves the vice of its origin, renders it extremely difficult for us now to escape from its entanglements. But it is not impossible. The practical lawyer who looks upon his profession as a mere stepping-stone to wealth, or place, or power, will, we are well aware, scoff at such notions as impracticable. But let him remember that law is not made for the lawyers, and that just so far

as lawyers take a high or low view of their duties, to that extent they will do something to raise or debase their profession and the law itself. An ideal is not only useful but essential to all improvement. We must go forward or backward, and which it is to be will depend upon our ideas rather than our practice. "An ideal," says Mr. Herbert Spencer, "far in advance of practicability though it be, is always needful for right guidance. If, amid all the compromises which the circumstances of the times necessitate or are thought to necessitate, there exist no true conceptions of better and worse—if nothing beyond the exigencies of the moment are attended to, and the proximately best is habitually identified with the ultimately best, there cannot be any true progress." The one great want of the profession is that it has no such ideal to purify its aims and direct its energies.

THE END.

CHARLES DICKENS AND EVANS, CRYSTAL PALACE PRESS.

00094619

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018